86-345

No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THREE WAY CORPORATION
and
BUDD MOVING SYSTEMS, INC.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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25 pp

QUESTIONS PRESENTED

The household goods transportation industry is currently restructuring itself pursuant to the new procompetitive philosophies of both the Motor Carrier Act of 1980 ("MCA") and the Household Goods Act of 1980 ("HGTA"). This case of first impression arises out of the Interstate Commerce Commission's ("ICC") implementation of Section 11342 of the HGTA, 49 U.S.C. § 11342, which requires the Commission to hold hearings to assess the permissibility of an agreement among motor carriers to pool or divide traffic or earnings if the proposed pooling agreement either is "of major transportation importance" or "there is substantial likelihood that the agreement or combination will unduly restrain competition." In view of the Commission's interpretation of its obligations under the new statute, and the precedential nature of its actions under review, the questions posed by the Petition are:

1. Did the Court of Appeals err in sustaining the Commission's decision to summarily (*i.e.*, without holding evidentiary hearings) approve and immunize a new pooling arrangement when such an arrangement achieved its purposes through the inherently anticompetitive device of restraining or limiting the scope of competitive services provided by individual ICC-certificated pool members?

2. Subsidiary questions arise out of the inconsistency of the Commission's actions below. Did the Court err in approving the Commission's actions which are:

   a. inconsistent with the purposes of the underlying statute;

b. inconsistent with its own guidelines implementing the HGTA;

c. inconsistent with its contemporaneous handling of another new van line pooling application;

d. inconsistent within its own Decision at bar wherein it struck down a discriminatory dual compensation scheme; and

e. inconsistent with its actions simultaneously granting operating authority to individual carrier-agents to provide the very service to the public which the new pooling arrangement now restrains and limits?

PARTIES

Petitioners Three Way Corporation and Budd Moving Systems, Inc. were Petitioners before the U.S. Court of Appeals for the District of Columbia Circuit. These Petitioners sought reversal of the Commission's decision in the Court of Appeals. Information concerning Petitioners, as required by Rule 28.1 of the Rules of the Supreme Court, is set forth in Appendix E to the Petition.

The Respondents urging affirmance of the ICC's decision were both the United States and the ICC. United Van Lines intervened in support of the Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-14a) is officially reported at 792 F.2d 232. The decision of the Interstate Commerce Commission (App. C, 17a-31a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1986 (App. B, 15a-16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 11342 of the HGTA, 49 U.S.C. § 11342, provides in pertinent part:

> (b)(1) Any motor common carrier of property may apply to the Commission for approval of an agreement or combination with another motor common carrier of property to pool or divide traffic or any services or any part of their earnings by filing such agreement or combination with the Commission not less than 50 days before its effective date. Prior to the effective date of the agreement or combination, the Commission shall determine whether the agreement or combination is of major transportation importance and whether there is substantial likelihood that the agreement or combination will unduly restrain competition. If the Commission determines that neither of these two factors exists, it shall, prior to such effective date and without a hearing, approve and authorize the agreement or combination, under such rules and regulations as the Commission may issue, and for such consideration between such carriers and upon such terms and conditions as shall be found by the Commission to be just and reasonable. If the Commission determines either that the agreement or combination is of major transportation importance or that there is a substantial likelihood that the agreement or combination will unduly restrain competition, the Commission shall hold a hearing concerning whether the agreement or combination will be in the interest of bet-

> ter service to the public or of economy in operation and whether it will unduly restrain competition and shall suspend operation of such agreement or combination pending such hearing and final decision thereon. After such hearing, the Commission shall indicate to what extent it finds that the agreement or combination will be in the interest of better service to the public or of economy in operation and will not unduly restrain competition and if assented to by all the carriers involved, shall, to that extent, approve and authorize the agreement or combination, under such rules and regulations as the Commission may issue, and for such consideration between such carriers and upon such terms and conditions as shall be found by the Commission to be just and reasonable.

STATEMENT

This proceeding, which involves both the Interstate Commerce Commission's initial interpretation of a new statute and a regulated industry currently undergoing restructuring, has implications far beyond the immediate adversely affected parties.

This Petition arises out of the Commission's summary immunization of a new pooling arrangement which substitutes a program of restraint limiting the competitive operations of independently certificated carrier-agents for the former policy authorizing full competition within the pool.

The household goods transportation industry is built upon ICC grants of antitrust immunity which authorize competitors to share markets and pool earn-

ings. As such, the industry exists as an accommodation between the antitrust and regulatory laws.

The agency system, which is a characteristic of the household goods transportation industry is, in turn, dependent upon ICC-immunized pooling arrangements. Because household goods traffic generally follows no predetermined pattern, an agency system aids carriers in securing return loads for maximum capacity utilization. Further, because most household goods movements occur during the four summer months, the agency system also helps alleviate equipment shortages during peak demand by sharing the household goods traffic.

Some ICC-approved and immunized pooling arrangements like United Van Lines' ("United") specifically embrace individually certificated, competitive carrier-agents within the immunized pool.

In the proceeding under review, the Commission, which has heretofore carefully evaluated the anticompetitive aspects of pooling arrangements on a case-by-case basis, summarily—*i.e.*, without hearing—authorized and immunized United's new pooling arrangement which completely repudiates its original procompetitive structure. Instead of encouraging its certificated carrier-agents to compete to the full extent of their individual certificated authority, United now restrains the geographic operations of its constituent carrrier-agents, even where that constraint conflicts with the carrier-agents' own specific ICC authority.

In the proceeding below, the Commission approved and immunized the new pooling arrangement without

affording the adversely affected carrier-agents (which it both authorized and obligated to perform transportation services for the public on their own authority by issuing individual certificates of public convenience and necessity) a hearing to present evidence of the anticompetitive nature of United's new pooling scheme.

United Van Lines is the Nation's third largest van line enjoying about 12% of the household goods transportation market in 1981. *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 220, fn. 7 (D.C. Cir. 1986).

United was formed some 30 years ago when the ICC approved and immunized a pooling arrangement among competitors. United's original charter specifically called for its constituent agents to continue to function as competitive carriers under their own ICC-granted certificates. In other words, under the original format United and its carrier-agents were specifically authorized to adopt the least anticompetitive form of traffic and revenue pooling by combining cooperative and competitive services under an umbrella of antitrust immunity. *Geitz Storage & Moving Co. Inc.—Investigation of Control*, 65 M.C.C. 257 (1957).

Pursuant to the original United pooling agreement, as carefully immunized by the ICC after extensive hearings, the constituent carrier-agents were expected "to continue the use of any operating authority as a carrier of household goods *within the territory authorized to be served by the agent under a certificate issued by the Commission.*" *Id.*, at 270 (Emphasis added).

At the time this present controversy began, the United pooling system was comprised of some 606

agents, more than 225 of which held independent operating authority from the ICC in their own names. While some of these certificated carrier-agents held separate authority from the beginning, others, encouraged by the procompetitive thrust of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793, and the Household Goods Transportation Act of 1980 ("HGTA"), Pub. L. No. 96-454, 94 Stat. 2011, followed the Congressional guide and obtained either new or additional independent authority from the ICC.

In belated response to this competition, and contrary to the original procompetitive structure of United Van Lines itself, the principal's management took two steps. First, it enacted a two-tiered compensation system pursuant to which United management imposed a 3% surcharge on the receipts of those carrier-agents that elected to exercise their ICC rights to haul goods for distances greater than 750 miles. And it imposed a graduated certificate-restricting scheme which applied to all of the more than 225 United carrier-agents (App. D, 36a-37a), and which culminated in the absolute prohibition of all individual carrier-agent operations beyond 1700 miles. United later sought ICC approval for its new competition-limiting pooling arrangement.

Thus, despite its original purpose and immunization order specifically insuring that each of the carrier-agents should operate to the full extent of its own certificated rights, United management now directed the constituent carrier-agents to chose certificate-restraining options in order to stay within the previous ICC-immunized pool. And, as stated above, it also imposed a discriminatory surcharge in the guise of a

"dual compensation plan" (which the Commission ordered United to "cease and desist from exercising" (App. C, 25a-26a) as an inducement for the certificated carrier-agents to comply with the new certificate-truncating pooling arrangement.

Even though the Commission did not notice United's application for immunization of its new pooling arrangement for public comment, twelve of the affected carrier-agents asked the Commission to hold a hearing under 49 U.S.C. § 11342 so that they might have a public forum to present their views regarding United's new pooling plan. United strenuously opposed its own agents' request for an evidentiary hearing arguing, in effect, for summary process immunization of the new certificate-restraining pooling arrangement.

The Commission's Employee Review Board found that neither of the statute's hearing-triggering standards were met and, therefore, summarily approved the new pooling arrangement. The Review Board held that "[t]he proposed modification of United's pooling agreement is not a matter of major transportation importance, and there is no substantial likelihood that the proposed modification will unduly restrain competition." (App. D, 48a). See, 49 U.S.C. § 11342(b)(1). In other words, the Review Board denied the various carrier-agents' requests for a hearing in a public forum.

The carrier-agents asked the Commission to reconsider the Review Board's denial of their request for an evidentiary hearing. The Commission, however, denied these pleas and at the same time incongruously explained that the findings of the Review Board are somehow "in accordance with the evidence." (App.

C, 28a). In other words, while denying the carrier-agents the protection of an evidentiary hearing, the Commission simultaneously held that "evidence" supported the immunization of United's new pooling arrangement. (App. C. 23a)

The Court of Appeals perpetuated the Commission's position of withholding an evidentiary hearing, and, at the same time, faulted the adversely affected carrier-agents for not submitting sufficient evidence. The reviewing Court criticized the carrier-agents for failing to "offer [ ] the Commission or this Court any reason to agree" with the proposition that "the lack of intra-firm competition will worsen the overall competitive nature of the industry." (App. A, 12a).

The Commission's handling of this case directly affected the rights of all 600+ United agents, at least with respect to chilling the potential use of their full substantive and procedural benefits under the MCA. More specifically, it summarily limited the rights—and, we submit, duties—of all of the 225+ certificated carrier-agents to exercise their individual operating authorities to the full extent granted by the ICC, and as specifically contemplated by the original ICC-immunized United pooling arrangement. (App. D. 36a-37a)

The Petitioners herein, along with other adversely affected carrier-agents simply asked the Commission to provide an unbiased forum to present evidence showing the anticompetitive impact of United's new pooling arrangement, which is so fundamentally different than the original pooling arrangement authorized by the Commission after extensive hearings. *Geitz, supra.*

Contemporaneously, the Commission did grant a full evidentiary hearing for a far less restrictive new pooling arrangement. *Atlas Van Lines, Inc.—Pooling*, 127 M.C.C. 799 (1983). Thus, the Commission was inconsistent both with its own prior treatment of United's pooling arrangement (*Geitz*) and a present restructuring of another van line.

It also acted inconsistently with its own policy articulated in the proceeding implementing the HGTA, *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599 (1981)("*Practices*"). There it stated that fostering "price and service *competition between and among principal carriers and their agents*. . .is now part of the national transportation policy and was the prime motivation. . .for enactment of both the new motor carrier and household goods legislation." *Id.*, at 632 (Emphasis added). The ICC did not even acknowledge, much less attempt to reconcile, its policy articulated in *Practices* with its refusal to grant a hearing to the adversely affected carrier-agents so that they may provide evidence showing the new pooling arrangement's adverse impact on "competition between and among principal carriers and their agents." And the Court below did not direct the Commission to explain the discrepancy between its policy statement, which is a purported guide to implementing HGTA, and its actions summarily approving United's new pooling arrangement, the mechanics of which specifically limit competition "between and among principal carriers and their agents."

Finally, the Petitioners below paid a severe price for asking the Commission to institute a hearing so that they could present their evidence and views of

the anticompetitive nature of United's new pooling arrangement. Because they refused to choose an "option" which would limit their ICC-granted authority, both Three Way Corporation and Budd Moving Systems were expelled from the United pool. This fact, in addition to being harmful to the Petitioners, sent a message to their former fellow carrier-agents. It also, in combination with the Commission's summary approval of United's new certificate-restraining pooling mechanism, provided a clear model for the presently restructuring household goods transportation industry.

United Van Lines is today engaged in another program to further constrain the ICC-certificated operations of the carrier-agents participating in its immunized pool.

REASONS FOR GRANTING THE WRIT

This is a case of first impression construing the hearing requirements of a new statute in the context of an industry undergoing competitive restructuring. Its impact, therefore, extends well beyond the immediate participants. As such, the regulated industry and the reviewing Court, as well as the adversely affected parties, were entitled to a record-based and factually grounded exercise of the Commission's expertise.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S SUMMARY IMMUNIZATION OF A NEW POOLING ARRANGEMENT. THE HEARING REQUIREMENTS OF THE HGTA SHOULD HAVE BEEN INVOKED PRECISELY BECAUSE THE INDUSTRY IS NOW BEING RESTRUCTURED

While the Court below recognized that the household goods transportation industry is being restructured (App. A, 8a), it also carefully noted that both the MCA and HGTA "sought to install a system of competition and *reduced* regulation in the industry." *Id.*, at 4a (Emphasis added). In other words, while the Commission's role has been "reduced," it has not been eliminated. The ICC still has Congressionally-delegated regulatory jurisdiction over the household goods transportation industry. And it is precisely because of that ongoing regulatory oversight that the Commission should have invoked its hearing process to provide an evidentiary record, both for itself and for the reviewing Court, from which it may guide the further restructuring of the affected industry in accord with the Congressional intent.

Because it did not grant the Petitioners,' and many other adversely affected carrier-agents' request for a hearing based on the inherently anticompetitive nature of the mechanism chosen to police the new pooling arrangement, the Commission, and correspondingly the Court, based their decisions on misperceptions of "evidence" or the lack thereof. (App. C, 23a, 28a, App. A, 12a).

Furthermore, the Commission's actions improperly put the Court into the position of acting as a regulatory agency *vis-a-vis* questions of transportation pol-

icy. Thus, the Court faulted Petitioners for not providing evidence showing that "the lack of intra-firm competition will worsen the overall competitive nature of the industry" (App. A, 12a), while at the same time, the Commission elsewhere articulated its expert view that fostering competition "between and among principal carriers and their agents. . .is now a part of the national transportation policy" and, indeed, was the prime motivation for the new household goods legislation. *Practices*, *supra*, at 632.

Moreover, the Court went on to quote the Commission's declaration that "the public interest is best served by protecting competition itself rather than these individual competitors" (App. A, 11a), yet affirmed the Commission's summary approval of a scheme which specifically restrained the competition "between and among principal carriers and their agents" to protect an individual carrier—United, in its role as the principal carrier.

Naked competitive restraint, rather than the enhanced competition intended by Congress in the MCA and HGTA (App. A, 4a, 11a), and, indeed, echoed by the Commission in *Practices*, *supra*, resulted from the Court's affirmance of the Commission's deliberately uninformed processing of the proceeding below.

Since this is a case of first impression, the agency charged by Congress to oversee the restructuring of the household goods transportation industry owed more to its regulatees and the reviewing courts.

If permitted to stand, the decision below will lead, and is now leading, the restructuring of the household goods transportation industry in a direction unintended by, and contrary to, Congressional intent.

II. THE COURT'S AFFIRMANCE OF THE COMMISSION'S ACTIONS ESTABLISHES A PRECEDENT CONTRARY TO CONGRESSIONAL INTENT AND OTHERWISE CONSISTENT COMMISSION POLICY

The Commission's action below—which summarily immunizes anticompetitive restraints on its own certificates as a mechanism to enforce compliance among members of a new pooling arrangement—is inconsistent with both the Congressional intent and its own otherwise consistent actions. If the Court's approval of the Commission's action at bar is allowed to stand, an aberrational decision will become the guiding precedent for an industry now restructuring itself.

Without arguing the merits of the case, we will briefly outline the inconsistency of the Commission's action in the instant proceeding.

A. The Commission's Action Is Inconsistent With Congressional Policy

The Court below succinctly stated the purposes of the MCA and the HGTA: "Both Acts sought to install a system of competition and reduced regulation in the industry, and the MCA had the express purpose of making it easier for carriers to enter the interstate market or expand their operations on an interstate basis." (App.A, 4a; see also, App. A, 11a). Despite this clear purpose, the Commission summarily approved a pooling plan whose operating mechanism specifically restrains the individual operating authorities granted by the Commission, and dissuades present non-carrier-agents from invoking their rights under the MCA.

We submit that the Commission's action raises grave doubt as to whether Congress would have ap-

proved the agency's accommodation of the policies of the MCA and HGTA with its hearing requirements under 49 U.S.C. § 11342. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984); *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

B. The Commission's Action Is Inconsistent With Its Own Policy Statement Implementing The HGTA

As we pointed out above, the Commission, in its rulemaking proceeding implementing HGTA, unequivocally stated its view that fostering "competition between and among principal carriers and their agents. . .is now part of the national transportation policy." *Practices*, *supra*, p. 632. Here, however, the Commission specifically allowed the competition "between and among [a] principal carrier[ ] and [its] agents" to be restrained as the mechanism driving the new United pool. This action is inconsistent with the Commission's own supposed policy guidelines.

C. The Commission's Action Is Inconsistent With Its Contemporaneous Handling Of Another New Pooling Arrangement

Atlas Van Lines, another ICC-immunized pooling arrangement, decided that it no longer wanted to pool traffic with certificated carrier-agents. Since pooling orders are permissive, *i.e.*, the Commission does not compel carriers to share traffic or revenues, Atlas' decision to terminate its pool was a private business decision not subject to the Commission's approval.

Later Atlas changed its mind and decided that it would pool traffic with certificated carrier-agents—but only in a very limited way. It would enter a pool with limited purpose carrier-agents whose certificated

authority only covered specifically defined classes of traffic—the so-called Kingpak and government traffic. (App. A, 7a-8a).

Only 30 such specialized carrier-agents were involved in Atlas' new pool. This relatively insignificant and highly specialized new pooling application was noticed in the *Federal Register* and accorded full hearing procedures.

On the other hand, United's new pooling arrangement, which constrained the full purpose certificated activities of all its more than 225 carrier-agents, was not set for hearing.

The Commission acted inconsistently in setting hearing for the limited purpose new Atlas pooling arrangement (involving only 30 carrier-agents) while, refusing to hear United's new pooling application which directly restrained more than 225 full service certificated carrier-agents, and dissuaded the remaining members of the 600-agent system from exercising their full benefits under the MCA and HGTA.

And, of course, the Commission acted inconsistently in refusing to set the new United pooling arrangement—which repudiated the very foundations of the original United pooling arrangement heard and approved in the *Geitz* case, *supra*—for hearings.

D. The Commission's Actions Within Its Own Decision Under Review Are Internally Inconsistent

As explained in the Statement, United's response to the expanded operating authority allowed its carrier-agents under the MCA was two-fold. It enacted a two-tiered compensation system under which it assessed a 3% surcharge on revenues of carrier-agents moving loads in excess of 750 miles. It also created

a so-called "option" program for all its certificated carrier-agents (App. D, 36a-37a) which *inter alia* prohibited carrier-agents from operating beyond a 1700-mile radius on their own ICC authority.

Addressing the propriety of the dual compensation system, the ICC stated that "the alteration of a compensation scheme in a discriminatory manner, giving preferential treatment to those carrier-agents that have acquiesced in its proposed new policy, is inherently coercive." (App. C, 26a). Thus, the ICC ordered United to "cease and desist from exercising its discriminatory dual compensation scheme now in effect." *Id.* Concurrent with striking down the "discriminatory scheme," however, the ICC immunized United's plan to prohibit long-haul carrier-agent operations altogether. These two actions are fundamentally inconsistent and constitute an arbitrary exercise of discretion.

The dual compensation scheme did not prohibit competition on long-haul runs in toto—it simply imposed a monetary disincentive. Thus, the plan had a chilling effect on long-haul competition which the ICC properly struck down. On the other hand, the new pooling arrangement eliminates long-haul competition beyond 1700 miles. In view of the express purposes of both the MCA and HGTA to facilitate competitive conditions, the ICC's action in upholding an absolute bar to competition in the long-haul market, while striking down a simple discouragement to it, is not only internally inconsistent, it also contravenes the express mandates of the two involved transportation acts, and is wholly arbitrary.

E. The Commission's Action Simultaneously Granting Certificated Operating Rights To Individual Carrier-Agents And At The Same Time Immunizing Their Principal's Plan To Restrict Or Restrain Those Certificates Is Both Inconsistent And Illogical

We will not dwell on this phenomenon at length. It is obvious, however, that something is amiss when a regulatory agency makes public interest findings that the public needs the service of individual carriers and embodies that finding in certificates of public convenience and necessity, and at the same time summarily immunizes a private entity's program to restrict or restrain those public franchises. This fact alone warrants a fully informed (*i.e.*, evidentiary record grounded) analysis by the Commission.

CONCLUSION

This case of first impression has moved the restructuring of the household goods transportation industry in a direction unintended by Congress, is at odds with otherwise consistent Commission action, and is antithetical to the very purposes for which United Van Lines was formed. As a result of the Commission's actions as affirmed by the Court below, a policy of competitive restraint has replaced a procompetitive accommodation which has characterized the United pooling arrangement from its inception. And that substitution of restraint for competition was accomplished by the Commission's summary immunization arising out of a threshold finding that restricting the operation of ICC-issued certificates will not unduly restrain competition.

The van line industry now has clear precedent authorizing it to restrain its certificated agents in a

manner inconsistent with the Congressional intent behind the MCA and HGTA. Instead of installing a system of competition "with the express purpose of making it easier for carriers to enter the interstate market" (App. A, 4a), the decision below makes it easier for principals to restrain the competitive activities of their carrier-agents.

Unless this Court intervenes, the nature of the household goods transportation industry will be fundamentally altered in a way contrary to Congressional intent. The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1280

THREE WAY CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

UNITED VAN LINES, INC., INTERVENOR

No. 84-1282

BUDD MOVING SYSTEMS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

UNITED VAN LINES, INC., INTERVENOR

Petition for Review of an Order of the
Interstate Commerce Commission

Argued May 9, 1985

Decided June 3, 1986

Charles H. White, Jr. was on the brief for petitioners.

Edward J. O'Meara, Attorney, Interstate Commerce Commission, with whom *J. Paul McGrath*, Assistant Attorney General, Department of Justice, *Robert S. Burk*, Acting General Counsel, *Lawrence H. Richmond*, Deputy Associate General Counsel, Interstate Commerce Commission, *Robert B. Nicholson* and *Marion L. Jetton*, Attorneys, Department of Justice were on the brief, for respondents. *John P. Fonte* entered an appearance for respondents.

Edward J. Kiley, with whom *Brainerd W. LaTourette, Jr.*, *Leonard A. Jaskiewicz*, and *James A. Calderwood* were on the brief, for intervenor.

Before: EDWARDS and BORK, *Circuit Judges*, and GESELL,* *District Judge*, United States District Court for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: Petitioners appeal the decision of the Interstate Commerce Commission approving without hearing the application of United Van Lines to amend the pooling agreement with its carrier agents. Petitioners, two affected carrier agents, argue that the amendments are anti-competitive and should not have received Commission approval under the Household Goods Transportation Act of 1980, 49 U.S.C. § 11342 (1982). We find, however, that the Commission properly denied a hearing because it correctly found that the proposed amendments are "not a matter of major transportation importance and that there is no substantial likelihood that the proposed modification will unduly restrain competition."

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1982).

I.

United is a van line that operated during the relevant period, through 606 trucking company agents, of which 228, the so-called carrier agents, held their own interstate operating authority granted by the ICC. Like several other large van lines, United, which is agent-owned,[1] was created because it was not economically feasible for most carriers to contract for long-distance carriage. Household goods traffic follows no predetermined pattern and it is extremely difficult for a single, unaffiliated carrier to secure return loads. Further, 60% of all household moves take place during the four-month period between June 1 and September 30 creating equipment shortages during the peak season and leaving equipment idle during the rest of the year. To overcome these problems, the Commission has allowed groups of carriers to participate in pooling agreements where it is in the public interest. United's original pooling plan was approved in *Geitz Storage & Moving Co.—Investigation of Control—United Van Lines, Inc.*, 65 M.C.C. 257 (1955). Approval by the Commission made it possible for United and its agents to become involved in long-distance carriage under United's name and authority and gave them a grant of antitrust immunity authorizing them to share markets and pool earnings. 49 U.S.C. § 11341 (1982). The United pooling agreement also allowed the carrier agents "to continue the use of any operating authority as a carrier of household goods within the territory authorized to be served by the agent under a certificate issued by the Commission." *Geitz*, 65 M.C.C. at 270.

The industry situation changed when Congress enacted the Motor Carrier Act of 1980 ("MCA"), Pub. L.

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[1] When United was before the Commission it had 129 stockholders, each of which owned 45 shares. All but eight of the stockholders are active agents. Approximately two-thirds of these agents are carrier agents.

No. 96-296, 94 Stat. 793, and the Household Goods Transportation Act of 1980 ("HGTA"), Pub. L. No. 96-454, 94 Stat. 2011. Both Acts sought to install a system of competition and reduced regulation in the industry, and the MCA had the express purpose of making it easier for carriers to enter the interstate market or expand their operations on an interstate basis. *See* 49 U.S.C. § 10922(b) (1982); H.R. Rep. No. 1069, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2296; *see also Policy Statement on Motor Carrier Regulation*, 44 Fed. Reg. 60,296 (1979). Several of United's agents, including petitioners, took advantage of this legislation by applying for and receiving operating authority for nationwide carriage. Carrier agents, with newly acquired operating authority, could trade on the United name and reputation and use United's services, but reserve the more profitable long-distance carriage—in the past routinely turned over to the United system—for themselves.

In response, United, in early 1981, notified its carrier agents that it planned to amend the pooling arrangement. On November 21, 1983, United formally petitioned the Commission to amend the pooling agreement because it believed that

> [i]n effect, the significant majority of [United] agents are subsidizing the[] four [nationwide carrier agents'] own independent operations as the latter continue to rely heavily upon [United's] national identification, assignment of shipments and the broad range of support services provided by [United] to all of its agents.
>
> . . . .
>
> If this trend continues, the result will be less-than-efficient utilization of [United] equipment, which can only lead to increased costs to [United] and the shipping public, coupled with reduced service capabilities on the part of [United] and its participating agents.

Respondents' Appendix at 8, 10. United's proposed amendments required carrier agents to tender to United any shipments in excess of 1700 miles.[2]

After consideration of the petition and the opposing comments, the Commission's Review Board found that the proposed agreement was not of major transportation importance and that there was no substantial likelihood that the agreement would unduly restrain competition. Brief for Petitioners at app. 8-22. Based on those findings, the Review Board approved the applications without further hearing, as mandated by the Act. On appeal, the Commission's Division One affirmed the findings of the Review Board concluding that:

> Here, the public will be better served by improving United's ability to compete with its non-agent competitors than by increasing the level of competition within the United system. While certain United agents may be adversely affected by their proposed exclusion from the long-haul market, it is clear that the public interest is best served by protecting competition itself rather than these individual competitors. Moreover, if the agents desire to continue competing with United for long-haul traffic, they may readily do so by severing their agency relationship with the United system. . . . [I]n strengthening United's ability to compete with other van lines, the proposal will more likely result in an increased over-

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[2] Prior to the United amendment, carrier agents could select one of three operating methods for transportation of household goods. The first allowed independent carriage on movements up to 750 miles; the second up to 1500 miles; and the third allows unlimited mileage. The extent to which United leased equipment from agents, allowed interlining of shipments between United and agent at point of origin, and otherwise assisted the particular agents depended on the method selected. The less independence elected by carrier agents, the more assistance United gave to them. Of United's 228 carrier agents in 1983, 207 chose the first plan, 17 the second, and only 4 the third.

> all level of competition and a corresponding enhancement of the public benefits which derive therefrom.

Brief for Petitioners at app. 4. It is from these decisions that petitioners appeal.

II.

The question presented for us on review is whether the Commission's decision not to give petitioners a hearing was "arbirary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2) (A) (1982).

Prior to the MCA, the Commission was required to hold a hearing to review all petitions. *See* 49 U.S.C. § 5(1) (1976). In passing the MCA, Congress provided for expedited review of pooling agreements by requiring the Commission to

> determine whether the agreement or combination is of major transportation importance and whether there is substantial likelihood that the agreement or combination will unduly restrain competition. If the Commission determines that neither of these two factors exists, it shall, prior to such effective date *and wtihout a hearing*, approve and authorize the agreement or combination . . . .

49 U.S.C. § 12342(b) (1) (1982) (emphasis added); *see* 49 U.S.C. § 11342(b) (3) (1982); H.R. Rep. No. 1372, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4271, 4280 ("[T]he Commission is directed to simplify and expedite its review of such agreements to the maximum extent practicable."). The Commission then must grant a hearing *only* when in its preliminary review it determines that the agreement is (1) of major transportation importance, or (2) will unduly restrain competition. To further the policy of expeditious review and deregulation, the HGTA provided that

> such agreement or combination shall be presumed to be in the interest of better service to the public and of economy in operation and not to restrain competition unduly if the practices proposed to be carried out under such agreement or combination are the same as or similar to practices carried out under agreements and combinations between motor common carriers providing transportation of household goods to pool or divide traffic or services of any part of their earnings approved by the Commission before the date of enactment of this paragraph.

49 U.S.C. § 11342(b)(2) (1982).[3] These statutory directions guide our review of the Commission's decision.

A.

Petitioners argue that the Commission failed adequately to explain its refusal to order a hearing in this case although it conducted one with respect to an analogous modification of Atlas Van Lines' pooling agreement. *See Motor Carriers, Atlas Van Lines, Inc., et al.—Pooling Application*, 48 Fed. Reg. 11,795 (1983). We disagree. In that case, Atlas announced that it intended to cancel its existing pooling agreement, under which its carrier agents could exercise independent operations to the extent of their certified authority. In place of this cancelled agreement, the van line proposed to execute a pooling agreement with those agents who possessed interstate authority only to the extent of so-called *Kingpak*, military pack-and-crate, and government commodities traffic. *See* Joint Brief for Respondents ICC & USA, addendum

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[3] The HGTA included other provisions to further the goal of deregulation of the household goods transportation industry. For example, the HGTA makes principal carriers fully responsible for the acts and omissions of their agents. 49 U.S.C. § 10934(a) (1982). The HGTA also provided an exemption from the antitrust laws for any discussions or agreements between a principal and its agents concerning rates, charges, allowances, or ownership. 49 U.S.C. § 10934(d) (1982).

B, at 1; *see also Household Goods' Carrier Bureau* v. *United States*, 288 F. Supp. 641 (N.D. Cal.) (discussing what constitutes *Kingpak* traffic), *aff'd mem.*, 393 U.S. 265 (1968). Any carrier agent holding interstate authority involving more than those limited classes of traffic had to transfer or otherwise dispose of its certificate to remain within the Atlas network. In determining whether to approve the new pooling agreement with the thirty agents that possessed the limited authority tolerable under Atlas' new policy, the Commission did, to be sure, provide a hearing, but was influenced in its decision to do so by its view that the new pooling arrangement had to be viewed in light of Atlas' pooling with respect to all of its agents, *i.e.*, that Atlas would "no longer pool with agents holding and operating under authority broader than that specified in the [new] agreement." *See* 48 Fed. Reg. 11,795 (1983). The impact they considered, therefore, extended not merely to those thirty carrier agents who joined the limited pooling agreement but also to the remainder of the carrier agents who could not continue to exercise their ICC-granted interstate authority. Because it had approved the Atlas changes and the industry was being restructured, the Commission concluded that the United changes in its pooling agreement were relatively insignificant. Thus, a further hearing was unnecessary because "the proposed pooling agreement modification [was] not a matter of major transportation importance and that there [was] no substantial likelihood that the proposed modification [would] unduly restrain competition." Brief for Petitioners at app. 19. Moreover, the Commission in *Atlas*, following the submission of written comments and evidence, did find that the proposed agreement was not one of major importance and was unlikely to affect competition adversely. *Atlas Van Lines, Inc.—Pooling Application*, No. MC-F-15004 (ICC July 15, 1983) (unpublished); Joint Brief for Respondents ICC & USA at addendum B. We cannot say, therefore, that the Com-

mission's holding of a hearing with respect to Atlas required another hearing with respect to United.

Further, Congress has directed the Commission to "expedite, to the maximum extent practicable," the process and approval of applications. It, therefore, would not be in keeping with the HGTA to require the Commission to ignore experience gained in the process of reviewing these matters. Having recently decided that the analogous *Atlas* proposal was not of major transportation importance and would not unduly restrain competition, it was not necessary for the Commission to hold hearings on United's proposal. *Cf. National Classification Committee* v. *ICC*, 779 F.2d 687, 693 (D.C. Cir. 1985).

The United petition is also entitled to a presumption of validity under the HGTA if it is substantially similar to practices carried out under pooling agreements in effect at the enactment of the HGTA. 49 U.S.C. § 11342 (b) (2) (1982). When the HGTA was enacted, several national van lines did not allow their agents to carry *any* independent operating authority. Allied Van Lines, for example, allows none of its agents to have independent operating rights in direct competition with it. *See Evanston Fireproof WHSE—Control—Allied Van Lines*, 40 M.C.C. 557 (1946); *see also Practices of Motor Common Carriers of Household Goods*, 115 M.C.C. 628, 638 (1972). United, however, allows its agents to exercise their independent authority and restricts only their long-haul carriage. Under the United agreement, agents can obtain interstate authority, but must limit their independent carriage to hauls of less than 1700 miles. Because 49 U.S.C. § 11342(b) (2) commands the Commission to "presume[]" a pooling agreement "to be in the interest of better service to the public and of economy in operation and not to restrain competition unduly" when that agreement is "the same as or similar to practices" existing prior to the enactment of the HGTA, it would be futile to set a hearing on United's petition

when there exist more restrictive pre-HGTA agreements that by section 11342(b)(2) enjoy presumptive validity. Where a hearing would serve little purpose, none is required. *Cf. National Classification Committee* v. *ICC*, 779 F. 2d at 693; *Citizens for Allegan County, Inc.* v. *FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

The United amendment also could be considered similar enough to its original pooling agreement to escape the necessity for a hearing under the statute. The original agreement allowed the agents to operate to the fullest extent of their Commission-granted operating authority. However, this agreement was drafted at a time when United and the Commission knew the agents were ineligible to conduct nationwide carriage. For thirty years, the United system operated with no carrier agent having nationwide authority. In approving the original plan, the Commission recognized that

> United is assured of sufficient traffic to perform nationwide long-distance hauling with a minimum of empty or partially loaded vehicle mileage at the lowest rates consistent with good service, and the carrier-agents can perform expedited more or less short-haul service immediately available to shippers in the vicinities of their domiciles.

Geitz, 65 M.C.C. at 297. Not until passage of the MCA with its deregulatory policies did any of United's carrier agents have independent nationwide authority. The United amendment does not return the system to the status quo ante but does move in that direction in order to avoid the inefficiencies created by carrier agents with their own nationwide authority who are able to use United's reputation and services for their own accounts without paying for those benefits. United's amendment affects only a small number of carriers and would actually leave the competitive posture of the United system essentially unchanged, something Congress felt was acceptable when it passed section 11342(b)(2).

Petitioners finally argue that United's action has effectively modified their operating certificates without a hearing contrary to "statutory directive, . . . Commission policy, and established court precedent." *See* Brief for Petitioners at 54-55 (footnotes omitted). The authorities cited by petitioners are inapposite. Each involves an explicit Commission revocation or modification. Here the Commission has not taken any steps to modify the certificates. Any modification is in the use made of the certificate, not to the certificate itself. Petitioners need not modify the use of their operating authorities unless they choose voluntarily to remain with United. That situation does not constitute a modification made subject to a hearing requirement by 49 U.S.C. § 10925 (1982).

B.

Petitioners also argue that the United proposal will unduly restrain competition and therefore a hearing is mandated. They contend that by limiting the independent operating authority of the carrier agents to independent carriage of less than 1700 miles, United has drastically reduced intra-system competition.

It is clear that the MCA and HGTA actively seek to promote competition through deregulation of the household goods industry. *See* H.R. Rep. No. 1372, *supra*, at 5. The Commission has interpreted these statutes to be concerned with inter-firm, not intra-firm, competition. The Commission held that "the public interest is best served by protecting competition itself rather than these individual competitors." Division 1 Decision, Brief for Petitioners at app. 4. The Commission noted that agents who want to compete with United for long-haul traffic "may readily do so" by leaving United. *Id.*[4] Petitioners argue

[4] In response to the limitation of intra-firm competition by their principals, several independent carrier agents have severed ties and have started new van lines to compete with their former principals. *See, e.g.*, A. Ronald & Son Transfer

that these statements fail to consider the realities of competition in the household goods transportation industry. Petitioners, however, fail to show any indication in the MCA, HGTA, or the legislative histories of those acts that the Commission's interpretation of the statutes is incorrect. Indeed, petitioners merely assume that the lack of intra-firm competition will worsen the overall competitive nature of the industry without offering the Commission or this court any reason to agree.

As the Commission recognized, United's proposed pooling agreement, like all pooling agreements, will certainly impose some restraint on rivalry. Congress recognized that pooling agreements have served the public interest and provided for their continuance by reducing the obstacles to approval of such agreements. *See* 49 U.S.C. § 11342(b)(1), (b)(3). The statute, therefore, requires a hearing only when the action "unduly restrains competition." 49 U.S.C. § 11342(b)(1).

Here competition between United and all other principal carriers is not lessened. All United has done is eliminate a free-rider problem within its system. The United agreement has allowed for efficient service of a nationwide market, something no one of the independent carriers could achieve alone. Allowing the carrier agents to compete without restriction makes it possible for them to rely on United and other agents to spend the time and money on training, equipment, services, and promotion to convince prospective customers that United has a superior service. But when a customer comes to a carrier agent, the carrier agent can choose to transport the goods under its independent authority without any obligation to United. The United amendment is an appropriate re-

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& Storage Co.—Pooling Application, No. MC-F-15239 (ICC July 1, 1983) (unpublished); Joint Brief for Respondents ICC & USA at addendum C (approval of a pooling application involving 28 household goods carriers, several of which were former carrier agents of larger principal carriers).

sponse to ensure that the level of United's assistance to its carrier agents corresponds with the carrier agents' level of use of United's interstate authority. There is no indication that United is trying to restrain competition at all. Indeed, the purpose of its changes is to promote more efficient competition with other national van lines.

The competitive significance of restraints on carrier agents within a van line are analyzed in another case decided by this court today, *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, No. 84-5845 (D.C. Cir. June 3, 1986). Several carrier agents in the Atlas network, forced by Atlas either to transfer their interstate authority to a separate corporation or to dissociate themselves from the network, brought a lawsuit charging an unlawful conspiracy in restraint of trade between Atlas and various of its carrier agents under section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). On a motion for summary judgment, the district court dismissed the plaintiff carrier agents' claim on several different grounds. *See Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 597 F. Supp. 217 (D.D.C. 1984). A panel of this court, finding that Atlas' policy was "designed to make the van line more efficient rather than to decrease the output of its services and raise rates," *Rothery*, slip op. at 2, affirmed the district court's decision.

The court in *Rothery* recognized the restriction on the independent exercise of carrier agent authority as an efficiency-producing restraint, ancillary to the contractual integration among Atlas and its agents. *See Rothery*, slip op. at 2-4, 7, 13, 22-26, 31. The court accepted the district court's conclusion that Atlas' carrier agents, while competing with Atlas in undertaking carriage for their own accounts, derived a subsidy from their affiliation with the Atlas network. *See id.* at 25. Such free riding, the court found, would produce an inevitable tendency to distort economic signals, causing carrier agents to overconsume Atlas' centralized services in dealing for

their own accounts and weakening the van line's incentive to provide such services, thus decreasing the system's effectiveness in serving consumers. *See id.* at 25-26. The court recognized the restraint imposed by Atlas as a classic attempt to counter free riding and to eliminate the economic distortions within the Atlas system. Though the present case arises in a different legal context, *Rothery's* discussion of the economic effects of such intra-van line restraints is applicable here and supports the Commission's decision, which we affirm.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D. C. 20001-2866

GEORGE A. FISHER
CLERK

GENERAL INFORMATION
(202) 535-3300

June 3, 1986

RE: Nos. 84-1280 et al.—Three Way Corporation v. United States of America and Interstate Commerce Commission

Dear Counsel:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,
/s/ DENISE C. THOMAS
DENISE C. THOMAS
Opinions Clerk

enclosures
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1280 September Term, 1985

THREE WAY CORPORATION,

Petitioner

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents

UNITED VAN LINES, INC.,

Intervenor

AND CONSOLIDATED CASE NO. 84-1282

FILED JUN 3 1986

ORDER

It is ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

GEORGE A. FISHER
Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-F-4901

No. MC-F-6152

UNITED VAN LINES INC.—POOLING AGREEMENT MODIFICATION

Decided: May 25, 1984

BACKGROUND

United Van Lines, Inc. (United) submitted a proposed modification to its pooling agreement for the Commission's prior approval and authorization. By such petition, United seeks permission to delete from its plan of operations a service option, which has allowed carrier agents to operate independently of the van line to the fullest extent of the operating authority held in the name of the individual carrier-agent. The modification requires, among other things, that all shipments of household goods moving beyond 1,700 miles be transported pursuant to United's operating authority. The Review Board approved the proposed modification by decision dated January 20, 1984.

Appeals were filed jointly by Associated Moving & Storage Co., Inc., Campbell's Moving Company, Inc., Coley Moving & Storage, Inc., Ideal Way Movers, Inc. (Associated, *et al.*)[1], and individually by Santini Bros., Inc. (San-

[1] A letter was received from counsel stating that Coley Moving & Storage, Inc., had been mistakenly included as a party to the joint appeal. In addition, Leonard-Wherley Moving Systems, Inc. subsequently withdrew its opposition to the proposal.

tini), Budd Moving Systems, Inc. (Budd), and Three Way Corp. (Three Way). UVL replied.

A number of parties have requested the Commission to stay the effective date of the Review Board's decision. By decision dated March 9, 1984, the Director of the Office of Proceedings stayed the effective date of the Board's decision pending resolution of the issues raised on appeal.

PRELIMINARY MATTERS

Budd moves to strike the reply of United. It contends that the reply grossly exceeds the Commission's page limitation for replies to appeals. UVL replied by arguing that the Commission's Appellate Rules of Practice do not apply, inasmuch as no hearing has been required by law or Commission action. UVL also requests waiver if the page limit is deemed to apply and submitted a revised reply that does conform to the page limit. Under the circumstances, we will accept the complete reply filed by United. Budd also complains that the Review Board incorrectly rejected one of its pleadings as a reply to a reply. The Board correctly ruled on this issue and, contrary to Budd's allegation, the ruling was not an abuse of discretion.

Santini renews its request for the Commission to take official notice of a Commission report and a Commission press release. It contends that the Review Board failed to rule on this request. We take official notice of the report and the press release submitted by Santini and they are made a part of the record.

Santini requests that the Commission institute an investigation of carrier-agent relationships in the household goods industry. The purpose of this proceeding is to decide whether a proposed modification to a pooling agreement will be approved and is not the proper forum for such an investigation. The request will be denied.

DISCUSSION AND CONCLUSIONS

Appellants have raised a number of substantive issues concerning the nature of the proposed modification, its potential impact on the structure of the household goods transportation industry, and its allegedly anticompetitive effects.

A. *The nature of the proposed modification as pooling.* Santini argues that the proposed modification is not "pooling" as that concept has developed under the statute and Commission precedent. It argues that pooling contemplates the sharing of a common market whereas the proposed modification is an attempt to divide the market by length of haul, with the agents agreeing voluntarily or involuntarily not to compete with United on shipments moving over 1,700 miles. Santini agrees that to the extent the parties will share traffic on movements within the 1,700-mile limitation, the proposal may be a pool within the Commission's jurisdiction. However, Santini contends that absent a grant of immunity, the asserted allocation of the long-haul market over 1,700 miles is a *per se* antitrust violation.

Under 49 U.S.C. 11342(a), pooling constitutes an agreement or combination between motor carriers "to pool or divide traffic or services or any part of their earnings." As Santini notes, these criteria are stated in the disjunctive; thus, if the proposal can be shown to fall within the ambit of any of these described activities, it will qualify as a pooling agreement. *Cf. Consolidated Freightways Corp. of Del., Pooling,* 109 M.C.C. 396, 600-604 (1971). The pool in this proceeding consists of all household goods traffic. The proposed division of this traffic permits agents to handle shipments moving less than 1,700 miles under their own authority. Shipments moving beyond 1,700 miles will be transported under United's authority. In return for relinquishing traffic moving over 1,700 miles, these agents will benefit from their affiliation with the United system

in handling other traffic. Thus, the required bilateral condition of a surrender or contribution by both parties is present. *Consolidated Freightways, supra,* at 603, citing *Atlantic Greyhound Corp.—Pooling,* 37 M.C.C. 543, 551 (1941). We conclude that the application is a valid pooling arrangement.

Three Way, Santini, and Associated, *et al.* also argue that United failed to obtain the assent of all of the participating carrier-agents and failed to notify the agents that the proposed modification had been filed by serving on them copies of the application. Appellants contend that unanimous assent is a necessary prerequisite for our approval of a pooling plan.

The Review Board discussed appellants' unanimous assent and notice arguments at length at pages 2-4 of its decision and we hereby adopt the Board's reasoning. We will note only that the direction of 49 U.S.C. 11342(b)(3) for us to "streamline, simplify, and expedite, to the maximum extent practicable, the process . . . for submission and approval" of pooling agreements or modifications is controlling here. As United points out in its reply, the alternative to seeking modification of the existing agreement would have been to disrupt the United system by terminating the existing pooling arrangement and then seeking Commission approval for a new pooling plan. To require United to follow the latter alternative would be to elevate form over substance. Moreover, *Associated, et al.* itself argues that a modification to an existing pooling plan is tantamount to the creation of a new agreement. Here, assent may be viewed in terms of the agents' continued participation in the pool. We conclude that the proposal constitutes a pooling arrangement within the meaning of section 11342, that all concerned parties had adequate notice of the proposed changes, and that the carrier-agents who elect to continue in the United system have assented to the modification. *See Atlas Van Lines, Inc.—Pooling,*

127 M.C.C. 799, 802 (1983) (any party to a pooling agreement may withdraw unilaterally).

B. *Relationship to the antitrust laws.* Both appellants, on the one hand, and United on the other, make extensive reference to antitrust concepts and policies in developing their arguments. While we agree with Three Way's position that in general exemptions from the antitrust laws should be narrowly construed, *see, e.g., Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds,* 437 U.S. 322 (1978), *aff'd* 616 F.2d 394 (1980), *cert. denied,* 449 U.S. 831 (1980), it is also clear that the antitrust immunity conferred by 49 U.S.C. 11341 attaches to all activities necessary to carry out the regulated transaction. Here, the restriction on the agents' participation in long-haul traffic is the gravamen of the proposed modification. Accordingly, section 11341 is applicable, and we are, therefore, required to evaluate the proposal under the statutory criteria of section 11342 in light of the national transportation policy and the public interest, rather than the antitrust laws. Compare *McLean Trucking Co.* v. *U.S.*, 321 U.S. 67, 87 (1944). Thus, such matters as Santini's observation that the record contains no analysis of product and geographic markets and submarkets and United's discussion of vertical restraints by a principal upon an agent as not being *per se* violations of the antitrust laws are clearly not central to the decisional process. Compare *Seaboard Air Line R. Co.* v. *U.S.*, 382 U.S. 154 (1965). Nevertheless, an analysis of a transaction for which antitrust immunity has been conferred clearly should include consideration of the effect on competition. *Penn-Central Merger Cases,* 389 U.S. 486 (1968); and *Northern Lines Merger Cases,* 396 U.S. 491 (1970). Indeed, the statute itself directs us to determine whether the effect on competition will be undue. This analysis appears below.

C. *Requirement for a hearing.* Three Way appears to argue that the Commission must hold a hearing to deter-

mine whether the proposal is a matter of major transportation importance. The statute, however, directs us to determine *on the basis of the application* whether the proposal is of major transportation importance and whether there is a substantial likelihood that it will unduly restrain competition. If either of these factors exists, the Commission shall hold a hearing concerning whether the agreement will be in the interest of better service to the public or of economy in operation and whether it will unduly restrain competition. 49 U.S.C. 11342(b)(1). The threshold issues before us are whether the proposed modification is of major transportation importance and whether the proposal demonstrates a substantial likelihood of unduly restraining competition.

All appellants regard the proposal as a matter of major transportation significance. They compare United's decision to foreclose the participation of carrier-agents in the long-haul market as analogous to the determination by Atlas Van Lines, Inc., another van line, to pool only with carrier-agents holding authority to transport narrowly defined categories of household goods.[2] Inasmuch as hearings were held in the *Atlas* proceeding, footnote 2, *supra,* appellants urge that a similar opportunity be afforded here to develop a record concerning potential impacts on competitive relationships in the affected segment of the household goods industry.

While the *Atlas* proceeding is analogous to the proposal at issue here in that both involve the contractual limitation by a van line on the scope of its carrier-agents' authorized operations, these two proceedings are clearly distinguishable in terms of the number of agents involved, the extent to which they will be affected, and the structure and own-

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[2] In No. MC-F-15004, *Atlas Van Lines, Inc., Et Al.—Pooling Application* (not printed), decided July 15, 1983, the Commission approved, after notice and hearings, the above-described pooling arrangement between Atlas and its carrier-agents.

ership of the van line involved. As the Review Board noted, 80 of United's 129 stockholders are carrier-agents. The stockholders, the majority of which are carrier-agents, elect a board of directors that establishes policies perceived to be in the best interest of the United system as a whole. It is thus clear that many of the agents themselves regard the proposed modification as beneficial to the United system. Further, as the Review Board pointed out, only 4 of United's 228 carrier-agents are presently operating under the option permitting them to handle long-haul traffic. In addition, as part of the proposed modification, United will expand by 200 miles an existing option permitting agents to handle traffic for distances of up to 1,500 miles. Thus, United's proposal will truncate the scope of the long-haul option proposed to be eliminated. We conclude that the proposal is not of major transportation importance.

Nor do we agree with appellants' contention that the modification will adversely affect competition. Here, the public will be better served by improving United's ability to compete with its non-agent competitors than by increasing the level of competition within the United system. While certain United agents may be adversely affected by their proposed exclusion from the long-haul market, it is clear that the public interest is best served by protecting competition itself rather than these individual competitors. Moreover, if the agents desire to continue competing with United for long-haul traffic, they may readily do so by severing their agency relationship with the United system. We cannot find that United's decision to restrict competition with its agents to be an undue restraint on competition. While there may be a disparity in market power between United and its agents, there is insufficient evidence that United's use of its market power to restrict competition with its agents will have an adverse effect on competition in general in the household goods industry. To the contrary, in strengthening United's ability to compete with other van lines, the proposal will more likely

result in an increased overall level of competition and a corresponding enhancement of the public benefits which derive therefrom.

D. *Consistency with the Household Goods Transportation Act.* Associated, *et al.*, Budd and Three-Way argue that the Review Board's decision to inconsistent with the policy of the Household Goods Transportation Act of 1980, Pub. L. 96-454, 94 Stat. 2011 (1980) (HGTA). Appellants argue that the purpose of the HGTA was to reduce unnecessary regulation of the household goods industry, strengthen consumer remedies and protection, and establish an atmosphere for flexibility in pricing and service to meet the needs of shippers. Appellants contend that in imposing restrictions on its agents' operations, United is undermining the HGTA's goal of facilitating public transportation benefits in the household goods sector.

As noted above, the most important source of competition at issue here is United's ability to compete with other, major van lines, rather than with its own agents. A number of other van lines do not permit their agents to hold any interstate operating authority, and thus face no internal sources of competition. To the extent that United's ability to compete with other van lines is adversely affected by competition with its agents, the purposes of the HGTA are thwarted rather than advanced.

E. *Procedural due process.* Associated, *et al.*, Three Way, and Santini argue that our affirmation of the Board's decision will result in a *de facto* revocation of their certificates without a properly noticed hearing. Associated, *et al.* argues in addition that our approval of the modification denies it procedural due process under the Fifth Amendment. Appellants position fails to recognize, however, that they may terminate their agency relationship with United and freely operate under the full extent of their certificated authority. In this proceeding, the Review Board did not initiate an investigation for the purpose of revoking

appellants' authority. Rather, it determined that the proposal of a van line to restrict the scope of an authorized pool was not of major transportation significance and did not have a potential to unduly restrain competition. Any resulting restriction on the agents' use of their authority is incidental to the Review Board's decision in the pooling application, and, ultimately, is dependent upon appellants' continued participation in the United system. We reject appellants' contention that the Review Board, in approving the proposed modification, deprived them of due process.

F. *The dual compensation plan.* Appellants argue that United, without prior Commission approval, introduced a discriminatory dual compensation plan in 1981, which assessed a three percent surcharge on those carrier-agents electing to participate in both the long-haul market and a second option permitting them to handle shipments moving up to 1,500 miles. Agents electing a third option permitting them to operate independently from United in handling shipments of up to 750 miles are assertedly not assessed the three percent surcharge. The dual compensation plan also appears to involve less frequent (monthly rather than weekly) settlements and more limited access to United's equipment. Appellants contend that but for the surcharge a significantly larger number of agents would have elected to participate in long haul traffic. In its reply, United recognizes the existence of the surcharge, but argues that is not a penalty or coercive tactic. United argues that the surcharge is warranted on economic grounds by enabling it to operate more efficiently in the long-haul market.

We are not convinced that the dual compensation plan has been a strong influence on the number of agents electing to participate in the long-haul market because at least a portion of the disincentives involved are also applicable to the 28 agents electing the 1,500-mile option. The small number of long-haul agents is more likely due to either a lack of authority or potential operational problems asso-

ciated with providing long-haul service. On the other hand, we find United's justification for the dual compensation plan to be unconvincing, particularly in light of a provision in the existing pooling arrangement permitting agents to freely exercise their operating authority. As the Commission recently noted in *Atlas Van Lines, Inc.—Pooling,* 127 M.C.C. 799 (1983), the alteration of a compensation scheme in a discriminatory manner, giving perferential treatment to those carrier-agents that have acquiesced in its proposed new policy, is inherently coercive. *Id.*, at 801. Accordingly, while we shall approve the proposal insofar as it contemplates the elimination of the long-haul option previously available to carrier-agents and the corresponding expansion of a second hauling option from 1,500 to 1,700 miles, we shall require United to cease and desist from exercising its discriminatory dual compensation scheme now in effect.

G. *Remaining issues.* Numerous additional arguments are raised by appellants. For the most part, these matters have been considered and discussed at length by the Review Board and do not warrant further comment here. However, a significant procedural issue arose in this proceeding as to whether the filing of appeals has the effect of automatically staying the effective date of the Review Board's decision.[3] Because this issue may arise in future pooling application proceedings we will consider it here. Commission action and appellate procedure in non-rail proceedings is governed by 49 U.S.C. 10322. Section 10322(a) is applicable in all matters not involving a rail carrier that are not specifically excluded. The pooling statute, section 11342, is not specifically excluded, and therefore, section 10322 would appear to apply to our consideration of pooling arrangements. Under section 10322(e), an interested

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[3] As noted above, in response to appellants' request, the Director of the Office of Proceedings stayed the effective date of the Review Board's decision. The issue thus remains as to whether the filing of appeals automatically stays an initial decision under these circumstances.

party may file an appeal within 20 days after service of an initial decision. Under section 10322(f)(2), if an initial decision is reviewed, it is stayed pending final determination of the issues raised on appeal. However, as we have already emphasized, Section 11342(b)(3) directs the Commission to "expedite to the maximum extent practicable" the approval process for pooling arrangements. Consistent with this requirement, the provisions of Section 11342 prescribe a unique procedure for the handling of pooling applications. In the event that the Commission determines that a proposed pooling agreement is of "major transportation importance" or that there is "a substantial likelihood that . . . [it] will unduly restrain competition" the Commission must hold a hearing and "*suspend operation of such agreement . . . pending such hearing and final decision thereon.*" 49 U.S.C. 11341(b)(1) (emphasis added). If the Commission determines that neither of the two threshold tests is met, it must approve the agreement without a hearing. In sum, the statute provides for a stay of the effective date of a proposed pooling agreement only if the Commission makes either the "major transportation importance" or the "restraint of competition" finding. In this proceeding neither of those findings has been made. We must conclude, therefore that appellants' appeal did not automatically stay the effective date of the pooling agreement; a contrary interpretation would, in effect, convert the proceeding to one in which one of the threshhold tests has been met.

Although on its face this holding appears to conflict with the automatic stay provisions of Section 10322(f)(2), we are convinced that Congress clearly intended that we use informal, expedited procedures to consider pooling plans that are of minor importance and are not anticompetitive. In any case, the provisions of Section 10322 were never intended to apply to *all* motor carrier proceedings. *See* 49 U.S.C. 10322(a). *See also Appellate Procedures,* 132 M.C.C.

539, 541 (1981). Therefore, the decision of the Review Board was not automatically stayed.

Budd, Three Way, and Santini complain of numerous "erroneous factual assumptions and findings" purportedly made by the Board in approving the proposed modification. Further, Three Way contends that the Board erred in not addressing a number of specific questions it considers relevant to the issue of whether a hearing should be held. Except for the dual compensation matter discussed above, the questions raised by Three Way, though relevant in some respects, do not require specific analysis. The Board's threshold finding that the proposed modification was not a matter of major transportation importance and that it did not unduly restrain competition is adequately supported by the record and will be affirmed here.

This decision does not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

The motion to strike filed by Budd Moving Systems, Inc., is denied.

The request of Santini Bros, Inc., to institute an investigation of carrier-agent relationships in the household goods industry is denied.

The appeals are denied because the findings of the Review Board, as modified herein, are in accordance with the evidence and the applicable law.

United is hereby ordered to cease and desist, and thereafter to abstain, from exercising a dual compensation schedule by length of haul which it initiated in 1981.

This decision shall be effective on the date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Sterrett, Taylor, and Andre. Com-

missioner Taylor is assigned to this Division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

JAMES H. BAYNE
Secretary

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-F-4901
No. MC-F-6152

UNITED VAN LINES, INC.—POOLING

Decided: March 9, 1984

By decision entered January 20, 1984, and served February 7, 1984, the Review Board approved the proposed modification of a pooling plan between United Van Lines, Inc. and its carrier-agents. The Review Board's decision states that it is to be effective 30 days after its date of service.

A number of appeals to the Review Board's decision have been filed, and the issue has arisen as to whether the filing of these appeals has the effect of automatically staying the effective date of that decision. Additionally, on this date, a petition for stay was filed by Three Way Corporation, a United carrier-agent.

Without determining the merits of this procedural issue of first impression, I shall stay the effective date of the Review Board's decision pursuant to the inherent power to the Commission.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

The effective date of the prior decision in this proceeding is stayed *nunc pro tunc* pending resolution of the issues raised on appeal.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

JAMES H. BAYNE
Acting Secretary

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-F-4901

No. MC-F-6152

UNITED VAN LINES, INC.—POOLING AGREEMENT MODIFICATION

Decided: January 20, 1984

By joint petition filed November 21, 1983, United Van Lines, Inc., and its carrier-agents seek approval of a proposed modification of their pooling plan. The plan, and subsequent modifications, previously received approval in a number of proceedings, the latest being No. MC-F-4901, *United Van Lines, Inc.—Pooling* (not printed), decided August 21, 1980.

Subsequent to the filing of this petition, United carrier-agents Three Way Corporation, Santini Bros., Inc., and Budd Moving Systems, Inc., tendered certain pleadings which will be treated as petitions for leave to intervene, embracing comments. United has replied separately to each of these pleadings, and Budd has tendered a reply to United's reply. Carrier-agent Sudath Van Lines, Inc., filed a comment opposing the petition which will likewise be treated as a petition which will likewise be treated as a petition for leave to intervene. Carrier-agents Campbell's Moving Company, Inc., and Stevens Van Lines, Inc., have filed a motion to discuss the application. Finally, carrier-agent Crowder's Transfer & Storage Co., Inc., has tendered a letter expressing knowledge and approval of the petition and carrier-agents Withens Van Lines of Miami, Inc., Associated Moving and Storage Co. Inc., and Lambert Transfer Co., Inc., have submitted letters or tele-

grams commenting on the petition and requesting that the petition be denied or that a hearing be held.

PRELIMINARY MATTERS

The petitions of Three Way, Santini, Budd, and Sudath express concerns and raise issues which warrant consideration and comment here. In the circumstances, although consideration of the tendered pleadings will delay the disposition of this proceeding, we do not believe that the delay will be undue, and we will grant the petitions for intervention and accept the tendered pleadings for filing. The replies to these pleadings thus also will be accepted. Similarly, the tendered letters and telegrams, viewed in conjunction with the other pleadings, provide valuable information and will be accepted. In considering these latter items, we will remain cognizant of the fact that they have been served on United or any other party. Budd's tendered reply to United's reply, on the other hand, will be rejected for the reason that this pleading does not add anything of value to the record, and the submission of such pleadings tends unnecessarily to delay disposition of proceedings.

Stevens and Campbell's move to dismiss United's petition essentially on two grounds. First, it is argued that United does not have the required assent of the participating carriers, and the Commission thus does not actually have any agreement before it. Second, they contend that United has attempted to circumvent the input of its carrier-agents and that none was notified of United's activity. Embraced in Santini's pleading is an argument that the petition must be rejected for the reason that Santini does not assent to the pooling plan, and throughout the pleading of Three Way are arguments that United improperly has failed to provide notice to its carrier-agents. In the circumstances, our discussion of the issues raised by the motion will be directed to Santini and Three Way as well as to the proponents of the motion.

The carrier-agents appearing here correctly cite the statutory provisions of 49 U.S.C. § 11342(a) which, as most pertinent, indicate that, "the Commission may approve and authorize the agreement or combination if the carriers involved assent to the pooling or division . . .". The position adopted by the carrier-agents, however, in the circumstances of this proceeding, clearly is overly stringent. As is indicated in our discussion below, United is controlled by stockholders agents, approximately two-thirds of which are carrier-agents. The letter submitted by Crowder's indicates that all 18 members of United's Board of Directors are agents, elected by shareholders. The petition before us represents the culmination of some 6 months or more of Board meetings, corporate communications, and opportunities for agent comments. The petition before us is not the first-time application of a group of carriers seeking to enter into a pooling arrangement. We have before us a different situation in which a modification of a previously approved pooling plan is proposed. The fact that United is agent-owned, and in fact carrier-agent controlled, lends to this situation a somewhat unique character. Obviously, United's Board of Directors could not require the unanimous consent of all carrier-agents to proposed policy changes. If it did, a limited number of carrier-agents, or a single one, could engender corporate stagnation. Similarly, were we to adopt the position advanced by the carrier-agents appearing before us, we would be placing such parties in a position to thwart the will of a large majority. A few carrier-agents, refusing to exercise their right to withdraw from their pooling agreement, could force a carrier-principal and its carrier-agents to continue, without modification, a pooling agreement which the majority have found to be counterproductive. Indeed, a single dissenting carrier-agent could conceal its opposition to change until the eleventh hour, and then come before the Commission to thwart the will of the majority to modify their pooling agreement. Were we to reject the petition here, we would

be forcing United either to withdraw from its pooling agreement and begin anew or to take steps to document precisely which of its carrier-agents desire to participate in the proposed modified pooling arrangement. Either course would work hardship for the large majority of United's more than 200 carrier-agents. This is particularly so in view of the fact that, as will be further discussed below, all carrier-agents have had actual knowledge of the proposed modification for many months. We note, in this connection, that the statute, at 49 U.S.C. § 11342(b)(3), directs us to "streamline, simplify, and expedite, to the maximum extent practicable, the process . . . for submission and approval of applications" of the type before us. We believe that the sought stringent interpretation of the assent provision is contrary to the directive of the just-cited section.

Campbell's and Stevens, in their motion, argue that, "none of the carriers were notified of United's activity and given the opportunity to present their views before the ultimate decision was made to present the amendment to the Commission." Three Way, throughout its pleading, vociferously argues that it was not given notice of the filing of the petition and that due process requires that it be given notice and opportunity to voice objection. Several carrier-agents submitting telegrams dated in early January indicate, simply, that have just become aware of the filing of the petition and that they desire that the matter be set for hearing. We find the argument regarding lack of notice to be without merit. United's reply to Three Way's petition indicates that adequate notice was given to its agents. The proposed policy change which is the subject of the petition was discussed at meetings of United's Board of Directors on July 12—14 and October 18—19, 1983. The chief executive officer of Three Way, Mr. Joe Bonino, is a member of United's Board, was present at both the July and October meetings, and did not vote against the proposal. Three Way, then, had actual knowledge of the matter

before us. On July 26, 1983, United sent to all its domestic agents, both carriers and noncarriers, a communication describing the terms, conditions, and anticipated effective date (January 1, 1984) of the policy change, and it invited contacts with area directors or with United's president. On November 4, 1983, a communication was sent to all United shareholders confirming the policy change and specifically advising that the change would take effect January 1, conditioned upon prior Commission approval. Carrier-agent Crowder's, in its letter, asserts that the subject of United's petition has been a matter of ongoing and open discussion and written communications since the first week of April 1983. Crowder's indicates that the matter was discussed at four specified meetings or conferences from the spring of 1983 through December 1983. It avows that, in addition, all agents have received a series of written communications and have been given ample opportunity to provide input.

The Commission's rules of procedure do not contemplate service of copies of a petition for approval of a pooling plan upon members of the plan. To a certain extent, such service would be tantamount to service upon oneself. To a large degree, such a situation exists here, since United is agent-owned and conducts business on behalf of its agents. In any event, the record clearly reveals that Three Way had actual knowledge of the proposed modification to the pooling plan, and any carrier-agent, through the exercise of due diligence, would have known not only the general contents of the petition but also the approximate date when it was to be filed. A requirement that United serve its carrier-agents not only would be inappropriate but also would be contrary to our statutory directive to streamline, simplify, and expedite the process for the submission and approval of the involved petition. All things considered, the motion and related requests will be denied.

THE PLEADINGS

United is a major household goods carrier authorized to transport such commodities between points in all 50 States. Its operations are conducted through a nationwide network of agents which currently totals 606 in number. United currently has 129 stockholders, each of which owns 45 shares of the corporation. All but eight of these stockholders are active agents. Approximately 80 are authorized carriers. The stockholders elect a Board of Directors which establishes policies perceived to be in the best interest of the United system. United, in essence, acts as the manager of transportation in coordinating services for its network of agents. In return for providing services, United retains a small percentage of revenue on those shipments tendered to it by its agents. The balance of revenues is returned to agents in relation to the services each performs. Independent household goods carriers choose to affiliate with United for the benefits derived from United's centralized dispatch operation, for the numerous support functions United provides, and for the national identification and recognition fostered by United's marketing programs. Currently, approximately 228 of United's 606 agents hold their own operating authority and thus are "carrier-agents." Only carrier-agents are participants in the pooling plan which is the subject of the petition for modification.

Currently, each year United's carrier-agents unilaterally select one of three operating methods for the transportation of household goods. In one method, agents may use their own operating authority in handling household goods independently from United on movements of up to 750 miles. In a second method, agents may elect to service shipments using their own authority on movements up to 1,500 miles. Lastly, some carrier-agents may operate on their own authority independent of United, without mileage limitation. The degree to which United leases equipment from agents, the extent to which interlining between

the United system and agents is permitted, and similar considerations are dependent upon the service selection made annually by each carrier-agent. During 1983, 207 of United's 228 carrier-agents chose to operate on a regional basis, using their own operating authority on movements of up to 750 miles. Seventeen carrier-agents chose to utilize their own authority for shipments moving up to 1,500 miles. Only four carrier-agents selected the unlimited mileage alternative. These four carriers are Ideal Way Movers Incorporated, of Marlboro, NJ, Leonard-Wherley Moving Systems, Inc., of York, PA, and commentors Budd and Three Way. Each of these four carriers holds authority enabling it to transport household goods over distances of more than 1,500 miles.

United here proposes to discontinue the unlimited mileage option and to expand the limit on option two from 1,500 miles to 1,700 miles. All household goods movements beyond the 1,700 mile parameter would have to be tendered by agents to United for transportation.

The stated basis for the petition is the allegation that a small number of United's carrier-agents have acquired and begun to use non-radial nationwide operating authority in a manner which, in United's opinion, is detrimental to the interest of United, its agents, and consumers. United asserts that the few agents which utilize their own authority on an unlimited mileage basis actively trade on the nationally-recognized United name and reputation, withhold the easiest to service and most profitable shipments for movement on their own authority, and register the least profitable and more difficult to service shipments with United. Such latter shipments must be serviced by other United agents. United avows that, while the agents which engage in such practices limit their contributions to the United system to those occasions which suit their interests, they continue to expect United to assign them the high quality cooperative tonnage tendered to the system by other United agents. In effect, United asserts, the sig-

nificant majority of its agents are subsidizing four companies' independent operations. The disruption of the United system, it is argued, would, if unchecked, lead to further and more serious operating problems, resulting in the United system's diminished ability to effectively compete with other major van line systems. If the disruptive trend continues, United asserts, the result will be less efficient utilization of United's equipment which can only lead to increased costs to United and the shipping public, coupled with reduced service capabilities.

United contends that the proposal represents only a "slight modification" to the practices and operating procedures which embody the approved pooling plan which has been in existence for nearly 30 years. The only market to be influenced is that involving the movement of household goods more than 1,700 miles. United points out that, in recent years, approximately 48 household goods carriers have applied for and received operating authorities enabling them to transport household goods substantially between all points in the United States. Further, approximately 78 percent of interstate household goods shipments are transported through the agency networks operated by the 10 largest van lines, one of which is United. All 10 hold nationwide authority and have the capability of handling household goods shipments moving in excess of 1,700 miles. The only lessening of service and routing alternatives which would stem from approval of the proposed amendment involves the few agents which previously elected to use their own authorities on an unlimited basis or that intended to select the unlimited mileage option in the next year. Such lessening would occur only in the event that such agents chose to remain as United agents. The proposed modification, it is asserted, would assist United in supporting its total agent network, its national corporate identification, and its equipment utilization and operating efficiency. Agents now engaging in what United terms "intrabrand competition" through use

of the unlimited mileage option would have the choice of affiliating with another van line or commencing operations as totally independent carriers. In either circumstance, it is asserted, no reduction in routing or service alternatives would result.

United avers that no adverse competitive consequences would result from approval of the proposed modification. Approval, United asserts, will prevent a deterioration of its ability to compete with other van lines and will enable United's carrier-agents to continue to exercise significant operational independence. Such independence, United contends, sharply contrasts with the severe restrictions which other major van lines impose on their agents. Regarding the relative transportation importance of the proposed modification as it affects the public and the national transportation system, United asserts that no discernible negative effect would result. United predicts that is ability to compete will be preserved as effective equipment utilization and other operational elements of long distance moving will be improved. Approval would render United's national marketing efforts more effective and would result in better service for the shipping public. Disapproval, it is contended, would foster equipment utilization inefficiencies which will lead to higher costs to the consumer. In such an event, United would seriously consider adopting restrictive approaches of the type to which other major van lines have turned.

Three Way considers itself a "targeted and coerced" carrier-agent which is to be expelled from the United system for exercising its Commission-created authority. It considers that, in effect, it is being "punished" for acting in furtherance of Congressional and Commission policy.

Three Way contends that the proposed amendment fundamentally changes the basic nature of the pooling agreement. United, it is contended, is proposing to stifle the very competition the statute encourages. Approval of the

petition, in Three Way's view, will have "catastrophic" results. The household goods transportation industry, it is argued, would be permitted and encouraged to restructure itself in an anti-competitive manner. Two types of van lines would survive: systems with no carrier-agents and systems with highly restricted carrier-agents.

Three Way's central argument is that the proposed departure from the previously approved plan raises issues of major transportation importance and is likely unduly to restrain competition. Three Way contends that this proceeding will establish an industry-wide precedent for van line constraint and limitation of carrier-agent operating authority. The proposed agreement, it is argued, may completely restructure the method by which national van lines function through carrier-agents.

Three Way considers the proposed amendment "harshly anti-competitive." It asserts that United is seeking to eliminate some existing competitors and to geographically constrain the operations of others. The geographical restrictions are viewed as a radical departure from the type of pooling format sanctioned by Congress. Three Way argues that the proposed restrictions on carrier-agent operations stifle not only intraband competition but also interbrand competition in the market for long haul transportation. Three Way argues that it, and other carrier-agents, will be expelled from the United system unless they "submit to demands they forfeit the economic viability of their individual certificates."

In arguing that this proceeding should be assigned for further hearing, Three Way asserts that, "upon information and belief," hearing will disclose that United has engaged in a prohibited discriminatory dual compensation scheme as a means of coercion of carrier-agents.

Santini is a certificated carrier, a stockholder of United, a carrier-agent, and a party to the original pooling agreement. It has elected to participate in option two because

it believes it would have had to give up substantial benefits if it has elected option three. In this connection, Santini indicates that it currently is entitled to have 15 units of equipment in dedicated service to United but that, if it had elected option three, it would have had to limit itself to 3 units of equipment permanently leased to United. Santini asserts that one of the initial principles governing the pooling agreement was that carrier-agents would retain the right to exercise their operating authority. Several years ago, however, Santini asserts, United began eroding the involved policy agreement with its series of options for which Commission approval had not been obtained.

Santini contends that approval of the petition will substantially restrain both intrabrand and interbrand competition. It is argued, for instance, that United is forcing uniform pricing as between itself and carrier-agents. A carrier-agent can quote binding estimates for shipments moving under United's authority, but if a carrier-agent requires greater pricing flexibility to capture the traffic, none is permitted unless the move is within the mileage option chosen. A carrier-agent is unable to offer discount rates for traffic moving beyond the limits of its mileage option, which United proposes to limit to 1,700 miles. Intrabrand competition, it is argued, will be eliminated.

Santini contends, also, that the proposal is of major transportation importance since at least 6 of the top 15 carriers in the field operate pursuant to extensive agency networks. Other carriers which operate with a combination of carrier-agents and noncarrier-agents, Santini believes, will seek relief similar to that sought by United here.

Budd has been a United agent since 1979 and acquired its own authority in 1981. Like Three Way, Budd asserts that it is being "punished" for exercising its operating authority and that United's proposal represents a fundamental shift away from the form of pooling favored by Congress. The Commission lacks authority, Budd contends,

to sanction pooling arrangements which so clearly restrain competition by carrier-agents. Budd vaguely refers to past coercive activities and highly restrictive proposals, while specifically alleging only a discriminatory dual compensation scheme. It refers to 3 percent surcharges placed on option two and three carriers.

Budd refers to the pooling agreement modification approved by the Commission in No. MC-F-15004, *Atlas Van Lines, Inc., Et Al.—Pooling Application* (not printed), decided by the entire Commission July 15, 1983. In that proceeding, the Commission approved Atlas's proposal to pool only with agents possessing and operating *Kingpak,* pack-and-crate, and Ex Parte No. MC-107 (government traffic) operating authorities. Budd asserts that in *Atlas,* the carrier-agents were not subjected to a dual compensation scheme and severe mileage limitations. Budd contends that United, unlike Atlas, is advancing a proposal involving significant change.

Sudath, a carrier-agent holding authority in 49 States, asserts, that in the past, United provided incentives for carrier-agents not to exercise options 2 and 3, but nevertheless permitted carriers already holding authority which permitted movements in excess of 1,500 miles to transport such shipments under "grandfather" agreements. Thus, carrier-agents could, under certain circumstances, utilize option 2 but still transport shipments in excess of 1,500 miles. It complains that with the elimination of option 3, about a third of its authority will be rendered useless. Sudath points to the revenue growth of United as evidence that the unlimited mileage option has not had a detrimental effect on the operational efficiency of the United system.

In reply to Three Way, United argues that a substantial portion of the industry already has moved toward far more restrictive limitations than that proposed, and such limitations have not been viewed as profound or radical. United

asserts that major carriers Allied Van Lines and North American Van Lines have adopted a significantly more restrictive stance in prohibiting their agents from possessing or utilizing any operating authority of their own. United emphasizes that Atlas, pursuant to Commission approval, now pools only with carriers holding very limited authority.

United argues that the Household Goods Transportation Act of 1980 and Commission policy have the purpose of encouraging competition between van line systems, not between a van line and its carrier-agents. Petitioner contends that a limitation such as that proposed can promote competition among principals. Heightened intrabrand competition, on the other hand, assertedly harms the ability of the system to foster competition with other national van line systems. United argues that it is clear under the antitrust laws that a principal may place restrictions on an agent even if the principal also directly competes with its agent. In any event, United questions the nature of the horizontal intrabrand competition to which Three Way refers. The only "brand," United contends, is the United brand with its destinctive name, color, and design.

Regarding Three Way's allegations of coercion, United avows that Three Way was represented on United's Board of Directors during the entire process of adjusting the involved policies, that Three Way never complained to United or sought to cancel its agency agreement, and that Three Way nowhere suggests that it has been subjected to any specific coercion. United indicates that it was not until after Three Way had established its agency relationship that it obtained its own operating authority and thrust itself upon United as a certificated nationwide carrier. United complains that Three Way now seeks to be an independent carrier aggressively competing with United while at the same time trading on United's trademarks, reputation, advertising, and central organization. Regarding Three Way's allegation, "upon information and belief,"

that United has been using a dual compensation scheme, United categorically denies, upon sure knowledge, that any dual compensation program now is or ever was in existence.

In reply to Santini, United reiterates a number of the arguments described above. United adds that Santini's claims of coercion are unfounded. Specifically with respect to Santini's complaints regarding equipment utilization policies, United avers that the matter is a question of economics. When a carrier-agent elects to operate independently within a shorter mileage parameter, and consequently to tender more traffic to the system, the system requires higher levels of equipment from that agent. Conversely, the larger the territory within which a carrier-agent operates independently, and the fewer loads it tenders the system for pooled transportation, the fewer the units that are required from that agent. United contends that Santini actually will benefit by the proposed expansion of the option two mileage limitation.

In reply to Budd, United refers to arguments previously advanced and adds that the competitive restraint about which Budd complains was precisely the known and approved result of the Commission's decisions establishing the original pooling plan.

United also addresses Budd's statements, characterized as erroneous, regarding the maintenance of a dual compensation scheme. Budd complains of a 3 percent surcharge placed on option two and option three carriers tendering traffic to the system. United indicates that the 3 percent figure did not represent a distinction between compensation paid carrier-agents and noncarrier-agents. United notes that, inasmuch as the system does not provide for the payment of dividends to shareholders, there has been in the past a system of providing additional compensation to agents who also were shareholders. The distinction in such system thus was between shareholders and

non-shareholders. In any event, United asserts, the system already has been discontinued, so that there is no distinction remaining. United avows that Budd specifically was advised of this discontinuation in July 1983.

DECISIONAL CRITERIA

Pursuant to the provisions of 49 U.S.C. § 11342(b)(1), and the Commission's pertinent regulations thereunder, a pooling agreement (or modification of an existing agreement) must be submitted to the Commission for approval not less than 50 days before its effective date. During this 50-day period, the Commission must initially determine whether the pooling agreement is of major transportation importance and whether there is substantial likelihood that the agreement will unduly restrain competition. If the agreement is not of major transportation importance and will not unduly restrain competition, we are required by the statute to approve the agreement without a hearing. Where either factor is found to exist, however, an evidentiary hearing must be held. In such circumstances, notice of the application or petition will be published and the Commission will schedule an evidentiary hearing in order to consider (1) whether the proposed agreement will be in the interest of better service to the public or of economy in operation and (2) whether it will unduly restrain competition.[1] Clearly, then, in those instances in which the Commission is required to approve a proposed agreement or modification without hearing, no consideration need be afforded to the two criteria identified immediately above or to the statutory presumption regarding pooling agreements of household goods carriers at 49 U.S.C. § 11342(b)(2).

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[1] *See* Ex Parte No. MC-141, *Motor Carrier Pooling Application*, 127 M.C.C. 746 (1981), in which the Commission set forth its general policy and promulgated rules implementing the statute.

DISCUSSION

We conclude that the proposed pooling agreement modification is not a matter of major transportation importance and that there is no substantial likelihood that the proposed modification will unduly restrain competition. There thus is no necessity for a further hearing which could result in the resubmission of cumulative arguments and further frustrate the statutory goal of simplification and expedition.

With due regard to the opposing parties' claims of catastrophic consequences, we do not perceive the proposed modification as a matter of major transportation importance. The household goods transportation industry already is engaged in the process of restructuring itself, and, as United notes, several major carriers have taken actions far more significant and drastic than that proposed here. The Commission-approved action of Atlas in entering into a pooling agreement with carriers holding only limited authority of the pack-and-crate and *Kingpak* scope was a significant step. The determination by some major carriers that they would no longer pool with agents holding authority also constituted significant action. We hardly think that the industry is going to restructure itself based on the action of an agent-owned and carrier-agent controlled system in modifying its pooling agreement in a manner which will affect a small minority of its approximately 228 carrier-agents and more than 600 total agents. We reject the argument that the proposed modification threatens damage to competition and progress in the household goods transportation industry.

We perceive no substantial likelihood that the proposed modification will unduly restrain competition. The commenting carriers characterize the proposed modified plan as anti-competitive. We remind these carriers that, as the Commission noted in *Atlas, supra*, the object of pooling arrangements ordinarily is the restraint of competition. It

is the Commission's mandate, in approving a pooling agreement, to find that the restraint shall not be undue. In *Atlas,* the result of the approved plan was that most of Atlas's carrier-agents would be forced to either give up their operating authority or surrender their status as agent members of the Atlas family. Here, only a handful of United's carrier-agents stand to have their participation in the pooling agreement circumscribed against their wishes. A larger number, those which have operated under option two or wish to elect option two instead of option one in the future, stand to have their participation expanded. The elimination of some competitors and the geographical constraint of the operations of some others, decried by opposing carriers, is consistent with the Congressionally sanctioned operation of carrier pools and is by no means radical in the circumstances before us.

We disagree with contentions that approval of the modification would result in the stifling of interbrand competition for long haul traffic. To the contrary, approval will prevent a deterioration of United's ability to compete with other major van lines. At the same time, carrier-agents holding broad geographical authority and wishing to withdraw from the pooling plan may do so and freely compete with United and other major carriers if they so desire. Regarding intrabrand competition, we find considerable merit in United's argument that the only "brand" involved is the United brand and that heightened intrabrand competition is harmful to the system.

While approval of the proposed modification may adversely affect some private interests, it is, of course, the public interest which is our primary concern. We believe that approval of the proposed modification will forestall further disruption of the agent-owned United system and will enable United to continue operating in essentially the same manner in which has operated for some 30 years. Approval of the proposed modification will enhance United's national marketing efforts, promote effective

equipment utilization, and improve other operational elements of long distance moving. From the viewpoint of the vast majority of United system agents and users, no actual change in the United system will result. To some, transportation alternatives which did not previously exist may appear.

All things considered, approval and authorization of the proposed modification is warranted.

We find:

The proposed modification of United's pooling agreement is not a matter of major transportation importance, and there is no substantial likelihood that the proposed modification will unduly restrain competition. The proposed modification should be approved and authorized. This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The tendered pleadings of carrier-agents Three Way Corporation, Santini Bros. Inc., and Budd Moving Systems, Inc., and Sudath Van Lines, Inc., are accepted for filing and made a part of the record.

The tendered letters and telegrams of Withers Van Lines of Miami, Inc., Associated Moving and Storage Co., Inc., and Lambert Transfer Co., Inc., are accepted into the record.

The reply to applicant's reply tendered by Budd Moving Systems, Inc., is rejected.

The motion of Campbell's Moving Company, Inc., and Stevens Van Lines, Inc., to dismiss the petition, is denied.

The petition of United Van Lines, Inc., and its carrier-agents to modify their pooling plan as set forth in their petition is approved and authorized, subject to the terms and conditions set forth in the petition.

This decision shall be effective 30 days from the date of its service.

By the Commission, the Review Board, Members Joyce, Fortier, and Krock.

JAMES H. BAYNE
Acting Secretary

APPENDIX E

Three Way Corporation

Three Way Travel Services
Three Way Pack & Crate
Three Way Customs House Brokerage
Three Way Air Freight
Three Way Ocean Services
Three Way International (T.W.I.)
Three Stars Leasing
EX.TR.A.S. (Executive Travel and Administrative Services)
L.M.I. (Logistics Management, Inc.)

Budd Moving Systems, Inc.

The Budd Moving Company, Inc.
Budd Commercial Movers, Inc.
Budd Leasing Corporation
M.B.C., Inc.

FILED
OCT 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THREE WAY CORPORATION

and

BUDD MOVING SYSTEMS, INC.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

BRIEF IN OPPOSITION OF INTERVENOR RESPONDENT UNITED VAN LINES, INC., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 2, 1986

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QUESTIONS PRESENTED

Intervening Respondent United Van Lines, Inc. ("United" or "Intervening Respondent") objects to the question the Petitioners have presented.

Contrary to Petitioners' statement, the Household Goods Transportation Act of 1980 (HGTA) was enacted as a reaction to the open-entry philosophy contained in the Motor Carrier Act of 1980 (MCA) so as to preserve existing pooling arrangements between van lines and their agents and to place limits on the Interstate Commerce Commission (ICC, Commission) ability to disrupt such arrangements. This is particularly recognized in 49 U.S.C. § 11342(b)(2). Contrary to petitioners' analysis of Section 11342, its emphasis is not to require that the Commission hold hearings on pooling agreements but rather that no such hearings are to be held unless the Commission determines, on an *ex parte* basis, that such a proposed pooling agreement is "of major transportation importance" or "there is substantial likelihood that the agreement or combination will unduly restrain competition." In the case of pooling agreements involving household goods carriers and their agents, such section contains a clearly stated presumption that such agreements or combinations shall be in the public interest and not in undue restraint of competition if such agreement reflects practices that are the same or similar to practices carried out under agreements between such carriers approved by the Commission before the date of enactment of the HGTA.

Viewed in such proper context, the questions posed by the Petition should be stated as follows:

1. Did the Court of Appeals err in sustaining the Commission's decision to approve a modification to an existing pooling agreement, where such pooling agreement was in existence prior to enactment of

the HGTA, and where such modification was for the purpose of preserving the nature of the pooling arrangement as originally approved by the Commission?

2. Were the actions of the Commission, affirmed by the Court of Appeals:

   a. inconsistent with the purposes of the underlying statute;

   b. inconsistent with the Commission's guidelines implementing the HGTA;

   c. inconsistent with the Commission's contemporaneous handling of another van line pooling application;

   d. inconsistent with Commission actions granting to individual carrier-agents independent operating authority competitive with the operating authority held by the van line principal?

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INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

BRIEF IN OPPOSITION OF INTERVENOR RESPONDENT UNITED VAN LINES, INC., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Intervening Respondent United Van Lines, Inc., opposes this petition to seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATUTE INVOLVED

Petitioners have reproduced at pp. 2-3 of their Petition *a portion* of 49 U.S.C. 11342. Specifically, Subsection (b) (1) has been reproduced, and is identified as the "pertinent part" of the involved statute. The Petitioners' identification of the statute involved, particularly their non-inclusion of a portion of the statute is misleading. The provision cited by Petitioners addresses pooling agreements involving any motor carrier of property. Subsections (b) (2) and (3) are those provisions of the

section dealing specifically with carriers of household goods. Further, Subsection (b) (1) is identified as being a portion of the Household Goods Transportation Act of 1980 (Petition, p. 2). In fact, that subsection was enacted as part of the Motor Carrier Act of 1980. Subsections (b) (2) and (b) (3) were added by the HGTA. Such subsections read as follows:

> (b) (2)—In the case of an application for Commission approval of an agreement or combination between a motor common carrier providing transportation of household goods and its agents to pool or divide traffic or services or any part of their earnings, such agreement or combination shall be presumed to be in the interest of better service to the public and of economy in operation and not to restrain competition unduly if the practices proposed to be carried out under such agreement or combination are the same as or similar to practices carried out under agreements and combinations between motor common carriers providing transportation of household goods, to pool or divide traffic or services or any part of their earnings approved by the Commission before the date of enactment of this paragraph.
>
> (3)—The Commission shall streamline, simplify, and expedite, to the maximum extent practicable, the process (including, but not limited to, any paperwork) for submission and approval of applications under this section for agreements and combinations between motor common carriers providing transportation of household goods and their agents.

STATEMENT OF THE CASE

Intervening Respondent will limit its statement of the case to identifying that part of Petitioners' "Statement" which contains erroneous or misleading references.

First, the case below did not involve the Interstate Commerce Commission's initial interpretation of this particular statutory provision. While there have been nu-

merous decisions of the Interstate Commerce Commission addressing pooling applications of common carriers of property, other than carriers of household goods, the Commission first interpreted the cited statutory provision in the household goods field in Docket No. MC-F-15004, *Atlas Van Lines, Inc.—Pooling Application* (not printed) served July 21, 1983, substantially in advance of the Commission's decision in the proceeding involving United Van Lines, Inc.

Petitioners' second erroneous statement occurs also at p. 3 where the application of United Van Lines, Inc., to modify its existing pooling agreement is identified as a "new pooling arrangement." To the contrary, the opinion of Judge Bork in *Three Way Corp. v. Interstate Commerce Commission, et al.*, 792 F.2d 232 (D.C. Cir. 1986) determined that the amended United Van Lines, Inc., pooling agreement was sufficiently similar to the prior pooling agreement so as to be entitled to the presumption of propriety reflected at 49 U.S.C. § 11342(b)(2), 792 F.2d at 236; Petitioners' Appendix A, p. 10a.

At p. 4 of the Petition it is suggested that the Commission's disposition of the United Van Lines, Inc., pooling agreement amendment was a marked departure from past practice, that is that the Commission had ". . . heretofore carefully evaluated the anticompetitive aspects of pooling agreements on a case-by-case basis. . . ." Petitioners' neglect to note that enactment of the HGTA required this changed method of evaluation of pooling agreement applications and amendments to existing arrangements when circumstances provided for by 49 U.S.C. § 11342 were present. Prior to enactment of § 11342, all pooling applications were the subject of a hearing requirement. Petitioners' Appendix A, p. 6a.

At pp. 6-8 of the Petition assertions are made to support Petitioners' conclusion that the amended pooling agreement of United Van Lines, Inc., was a radical alteration of and departure from its original pooling agreement first approved by the Interstate Commerce

Commission in *Geitz Storage and Moving Co., Inc.—Investigation of Control*, 65 M.C.C. 257 (1957). Petitioners, however, overstate the significance of that portion of the Commission's exhaustive decision originally approving the United Van Lines, Inc., system of operation through pooling with carrier-agents. The Commission concluded in its decision approving the plan that competitive limitations inherent in such a plan were for a purpose—the division and segregation of a portion of the household goods transportation market in order to achieve efficiencies for the benefit of the shipping public.

> As indicated previously, competition between United and its carrier-agents is to some extent restrained by the pooling proposal, although not completely in that each carrier participating will continue to perform transportation under its own operating authority. However, under the proposal, the carriers involved are enabled to operate more efficiently, *each in the field for which it is best fitted.* United is assured of sufficient traffic to perform nationwide, long-distance hauling with a minimum of empty or partially loaded vehicle mileage at the lowest rates consistent with good service, and the carrier-agents can perform expedited, more or less short-haul service immediately available to shippers in the vicinity of their domiciles.

65 M.C.C. at 297. [Emphasis added.] *See also* Petitioners' Appendix A, p. 10a, for a discussion of the consistency achieved by the amendment to the pooling plan with the original plan approved in 1957.

At p. 8 of the Petition, it is asserted that what has been denied to Petitioners is that which they have a right to receive—a full evidentiary hearing with regard to the amendment proposed by United Van Lines, Inc., to its pooling agreement. Ignored by Petitioners is the clear statutory command that no such hearing is desired by Congress where the effect of such modification is so limited so as not to alter in any significant way the scope

of the agreement previously approved and in effect as of the date of enactment of the HGTA.

In attempting to further support their contention, Petitioners at p. 9 attempt to characterize the Commission's decision in the United Van Lines, Inc., proceeding as being inconsistent with that agency's determination to hold a hearing in the previously cited case involving a pooling application of Atlas Van Lines, Inc.[1] Not mentioned by Petitioners is the fact that the cited *Atlas* decision involved an entirely new pooling agreement, as opposed to merely an amendment to an existing one, and further that at the conclusion of the hearing in that proceeding the Interstate Commerce Commission determined that such agreement was not one of major transportation importance and did not unduly impact on competition. *See* Petitioners' Appendix A, p. 8a.

NO REASON EXISTS FOR GRANTING THE WRIT

Rule 17 of the Rules of the Supreme Court of the United States provide the "character of reasons" to be considered in determining whether to grant or deny a Petition for a Writ of Certiorari. The petition for the writ sought here does not fit these categories. Clearly, the decision of the Court of Appeals is not in conflict with the decision of any other federal court of appeals on the same matter nor has a federal question been decided in a way that conflicts with the decision of a state court of last resort. Nothing in the decision by the Court

---

[1] Petitioners erroneously identify this proceeding as being reported at 127 M.C.C. 799 (1983). The cited decision, *Atlas Van Lines, Inc.—Pooling*, did not involve the Commission's approval of a pooling application, but rather a decision that it had no jurisdiction over Atlas Van Lines' termination of its previously existing pooling agreement, and that van line's decision to only associate itself with agents which had no ICC authority—that is to say, non-carriers. The Atlas decision cited by Intervening Respondent is most likely that which Petitioners intended to cite and which involved Atlas' replacement pooling plan with carrier-agents who, by agreement with Atlas, could only hold specifically limited types of Interstate Commerce Commission operating authority.

of Appeals calls for an exercise of this Court's power of supervision in that no departure from the accepted and usual course of judicial proceedings exists. Nor has the Court of Appeals decided an "important question of federal law" which has not been but should be settled by this Court, nor is there any conflict between the decision of the Court of Appeals and any decision of this Court.

Petitioners call this case one of "first impression" and urge granting of the Petition on that basis. While Intervening Respondent would agree that this Court has yet to evaluate the cited provisions of the HGTA, the context of the decision of the Interstate Commerce Commission at issue must be kept in perspective. As noted, what was at issue was a minor modification to an already existing pooling arrangement, the impact of which directly affected no more than four carrier-agents of the more than 600 agents participating with United Van Lines, Inc., in the transportation of household goods. *See* Petitioners' Appendix A, pp. 3a, 5a, N.2. Moreover, as it demonstrated in the decision of the Court of Appeals, the ICC had already issued a decision following the award of a "hearing" and which interpreted the very provisions of the HGTA at issue here. Petitioners' Appendix A, pp. 7a, 8a. For the Commission to have granted a hearing to Petitioners with regard to the United Van Lines, Inc., modification to its pooling arrangement would have been clearly inconsistent with the statutory provision at issue and its legislative history.

I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DECISION OF THE INTERSTATE COMMERCE COMMISSION. TO DO OTHERWISE WOULD HAVE BEEN INCONSISTENT WITH THE HOUSEHOLD GOODS TRANSPORTATION ACT OF 1980

When reduced to its essentials, Petitioners' argument is one of claimed inconsistency. Petitioners argue that the decision of the Court of Appeals affirmed a decision of the ICC inconsistent with the provisions of the HGTA,

inconsistent with the National Transportation Policy as embodied in the MCA, inconsistent with that agency's decision in *Atlas, supra.*, and inconsistent with its own regulatory implementation of the HGTA, *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599 (1981). The decision of the Commission and the decision of the Court of Appeals in affirmation are none of those things.

Initially, we note that the decision of the Court of Appeals essentially affirms an interpretation by the ICC of a portion of a statute, the HGTA, by which that agency is commanded by Congress to regulate a portion of the motor carrier industry. As such, that agency's interpretation is entitled to due deference, accorded it by the Court of Appeals. *Chemical Manufacturers Association, et al. v. Natural Resources Defense Council*, 470 U.S. 116, 124 (1985); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 461 U.S. 956 (1984). Petitioners assert at pp. 11-12 that the Court of Appeals "recognized" that the HGTA and the Motor Carrier Act of 1980 sought to foster competition within the motor carrier industry, and that the decision of the Commission thwarts such procompetitive philosophy by allegedly allowing Intervening Respondent United Van Lines, Inc., to engage in "naked competitive restraint," and in a manner incompatible with the purposes of the cited statutes.

The decision of the Court of Appeals correctly commences its analysis of Petitioners' "consistency/inconsistency" argument with reference to the original decision of the Commission approving the pooling agreement of United Van Lines, Inc. The 1957 decision in *Geitz Storage & Moving Co.—Investigation of Control—United Van Lines, Inc., supra.*, allows carrier-agents to continue to have the use of their operating authorities issued independently to them by the ICC but also notes that in 1957 such operating authority, by Commission practice, only gave to such carrier-agents the ability to operate in-

dependently in shorthaul transportation services located in the vicinity of their domiciles. Petitioners' Appendix A, p. 10a, citing 65 M.C.C. at 270 and 297. The Court also notes that this situation changed dramatically with enactment of the MCA, Pub. L. No. 96-296, 94 Stat. 793, and the HGTA, Pub. L. No. 96-454, 94 Stat. 2011. While both Acts did seek to install a system of competition and reduced regulation, only the MCA had the express purpose of making it easier for carriers to enter the interstate market or expand their operations by acquisition of broad operating authority. Petitioners' Appendix A, pp. 3a-4a. The Court also notes at p. 10a of Petitioners' Appendix A that until passage of the MCA none of United's carrier-agents possessed independent nationwide operating authority. In such context, the Court of Appeals recognized that the United modification to its pooling plan was an effort to preserve, to the maximum degree possible, the original purposes of the pooling plan consistent with the new provisions of the HGTA. At p. 10a of Petitioners' Appendix A, the Court noted,

> The United amendment does not return the system to the status quo ante but does move in that direction in order to avoid the inefficiencies created by carrier-agents with their own nationwide authority who are able to use United's reputation and services for their own accounts without paying for those benefits. United's amendment affects only a small number of carriers and would actually leave the competitive posture of the United system essentially unchanged, something Congress felt was acceptable when it passed Section 11342(b)(2).

Further, the Court of Appeals relied upon that part of 49 U.S.C. § 11342, which deals specifically with household goods carriers, and not identified by Petitioners as "relevant" in the Petition.

The Court of Appeals carefully considered the intent of Congress in enacting the HGTA vis-a-vis the pooling activities engaged in as part of the household goods trans-

portation industry. The Court first noted that prior to enactment of the MCA the Commission was required to hold a hearing to review all petitions seeking the approval of a pooling agreement amendment. Petitioners' Appendix A, p. 6a. It was the MCA (and not the HGTA) which enacted 49 U.S.C. § 11342(b)(1) identified by Petitioners as the only relevant statutory provision. The Court of Appeals recognized that the purpose of the changes to this provision were for obtaining approval of such pooling agreements without the necessity for a hearing and providing for expedited review of such agreements. *Id.* The Commission is given, by that section, the specific authority to approve pooling applications on an ex parte basis, and without a hearing, unless the Commission determines by such preliminary review that the agreement is of major transportation importance and whether there is substantial likelihood that such agreement would unduly restrain competition. The HGTA, the Court advises, further refined and made more expeditious this review process by presuming that pooling agreements which are the same or similar to agreements in existence prior to enactment are in the public interest and do not unduly restrain competition. *Id.* at 7a.

In concluding that the Commission was correct in its determination regarding the United Van Lines, Inc., pooling plan modification, the Court of Appeals analogized such decision with that of the Commission in *Atlas Van Lines, Inc.—Pooling Application*, No. MC-F-15004 (I.C.C. July 15, 1983) (unpublished). In that case, decided prior to the decision reached by the Commission in the United Van Lines, Inc. proceeding, a hearing was ordered, Atlas having terminated its prior pooling arrangement and having filed an application to begin a new pooling plan with carriers which had agreed to independently operate only under very severely circumscribed ICC operating authorities. See Petitioners' Appendix A, 7a-8a. Having conducted the hearing, the Commission concluded that the proposed agreement was not of major importance nor

was it likely to adversely affect competition. *Id.* Having examined the basis for the Commission's decision in that case, the Court of Appeals concluded with regard to the United Van Lines, Inc., proposal,

> Further, Congress has directed the Commission to "expedite, to the maximum extent practicable" the process and approval of applications. It, therefore, would not be in keeping with the HGTA to require the Commission to ignore experience gained in the process of reviewing these matters. Having recently decided that the analogous *Atlas* proposal was not of major transportation importance and would not unduly restrain competition, it was not necessary for the Commission to hold hearings on United's proposal. Cf. *National Classification Committee v. I.C.C.*, 779 F.2d 687, 693 (D.C. Cir. 1985).

Id. at 9a.

The Court then concluded that the United Petition for Modification was also entitled to the presumption of validity under 49 U.S.C. § 11342(b)(2) in that its modified pooling plan was far less restrictive than other arrangements in effect for competing national van lines and which had been in effect at the time of enactment of the HGTA. *Id.* at pp. 9a-10a. The Court also concluded that United's modified plan was entitled to the presumption because it was sufficiently similar to its original pooling plan *in operative effect.* The Court noted that the original agreement did allow carrier-agents to operate to the fullest extent of their Commission-granted authority, but that such agreement had been drafted at a time when all parties and the Commission knew that such agents were ineligible to conduct nationwide operations. The Court noted that it was the open-entry policies of the MCA which had allowed carrier-agents to upset this balance which the amendment to the United Van Lines, Inc., pooling plan was designed to retrieve. *Id.* at p. 10a.

Thus, the Court of Appeals recognized that while the MCA had vastly increased the opportunity for the obtain-

ing of additional operating authority, the HGTA by amending 49 U.S.C. § 11342 in effect balanced such open-entry provisions by assuring continuation and preservation of existing pooling plans.

Support for the validity of the Court of Appeals affirmance of the Commission decision is found in a recent and exhaustive discussion of the effect of the HGTA upon van line/agent relationships, and in the wake of the open-entry policies fostered by the MCA. As pertinent to the Petition for a Writ of Certiorari, Intervening Respondent United Van Lines, Inc., references this Court to the decision of the United States District Court for the District of Columbia in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 597 F. Supp. 217 (D.D.C. 1984), *aff'd Rothery Storage & Van Co., et al. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986). While the decision Judge Oberdorfer granted a motion for summary judgment regarding an antitrust claim brought against Atlas Van Lines, the analysis of this van line/carrier-agent relationship as it had been affected by the HGTA is instructive:

> This memorandum has already described the "facts peculiar to' the van line and moving industry, and the recent legislative and regulatory changes leading to the new Atlas policy. Prior to deregulation, Atlas had given its carrier-agent companies permission to use the Atlas infrastructure to compete with Atlas itself, for their own accounts, within the boundaries set by federal regulations and ICC oversight. Classic agency law, however, gives a principal the prerogative of withdrawing such permission if convenient to protect the principal's interest. *See Restatement of Agency*, 2d § 1(1)14 N, 393-394. Nothing in the legislative history of Congress' deregulation of the household moving goods industry suggests that when Congress removed the regulatory restrictions on carrier-agent independent operations, it added a restriction barring van lines from exercising this prerogative. Indeed, the legislative

> history of the measure shows just the opposite: that Congress had no intention of disturbing the ability of a van line to reach agreements enforcing "the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject matter of the agency." S. Rep. 497, 96th Cong. 1st Sess. 8 [footnote omitted]. Congress may well have speculated that by widening the regulatory boundaries on carrier-agent independent operation, it would have triggered more independent operation of that sort. However, when it lifted those restrictions, it did so —consistent with the free market philosophy supporting deregulation in general—to create an *option* not a *mandate* [footnote omitted, emphasis in original]. Congress, thus, left each individual van line free to fashion its own response to deregulation—or, in Atlas' case, to the prospect of widescale price competition from its own agents using the van line's own infrastructure. Atlas' choice was to protect against the further diversion of its own business infrastructure in this fashion, and instead to strengthen its competitive position by returning to a traditional agency arrangement whereby its agent companies serve Atlas alone. As such, the new Atlas policy [a policy of canceling its pooling agreement within which there were no restrictions on carrier-agents competition with the van line] plainly had a legitimate business purpose, and is consistent with policies chosen by Congress with respect to the choice between regulation and competition in this industry.

597 F. Supp. at 232-233.

Nor is the decision of the Court of Appeals affirming that of the ICC "inconsistent" with the Commission's decision in *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599 (1981). Petitioners vigorously assert that the language of such decision, quoted at pp. 9, 12 and 14 of the Petition establishes a policy which specifically prohibits the sort of modification to an existing pooling plan proposed by United Van Lines, Inc., and approved by that Commission. The section of the cited

Commission decision from which such language is taken renders it unsupportive of the conclusion advanced by Petitioners. Prior to the cited decision of the Commission, that agency had promulgated certain rules, specifically 49 C.F.R. §§ 1056.18 and 1056.21. Such rules had the effect of requiring carrier-agents, when performing services pursuant to their independently issued operating authorities and in direct competition with their van line principals to charge the identical rates which the van line had published in tariffs covering such service. The Commission concluded that such uniformity of rates provisions should be deleted so that to the extent carrier-agents would engage in direct competition with their principal van lines, they should be free to charge whatever rate they wished. However, as was noted by the Commission in its decision approving the modification proposed by United Van Lines, Inc. to its pooling agreement and by Judge Oberdorfer in his opinion in the cited decision involving Atlas Van Lines, Inc., the van lines remain free to determine the limits by which it will permit such direct competition. Petitioners' Appendix A, pp. 23a-24a; 597 F. Supp. at 532. Again, there exists no inconsistency.

The final inconsistency argued by Petitioners concerns the issuance to them by the ICC of nationwide operating authorities on the basis of public interest conclusions while at the same time approving United Van Lines, Inc.'s proposal allegedly placing limits on the use which might be made by Petitioners of those authorities. At p. 17 of the Petition it is argued that ". . . something is amiss when a regulatory agency makes public interest findings that the public needs the service of individual carriers . . . at the same time summarily immunizes a private entity's program to restrict or restrain those public franchises." Firstly, and as was noted by the Court of Appeals, no modification to the certificates was made, but rather the use which might be made by Petitioners of such certificate within Petitioners' agency

status with United Van Lines, Inc. As the Court noted, "Petitioners need not modify the use of their operating authorities unless they chose voluntarily to remain with United." Petitioners' Appendix A, p. 11a. Moreover, the certificates issued to Petitioners were issued to them as independent business concerns, and not as agents of United Van Lines, Inc. By voluntarily selecting to participate in a pooling agreement as opposed to operating their nationwide certificates on a totally independent basis, any carrier-agent choosing to remain with United Van Lines, Inc., is choosing to have its independent operations modified as approved by the ICC when the modification to the pooling plan was itself sanctioned.

CONCLUSION

There does not exist, either in the plain language of 49 U.S.C. § 11342(b) nor in the legislative history of the HGTA nor in any ICC decision or policy pronouncement, support for Petitioners' essential argument—that the principles of agency law have no application to pooling agreements involving interstate household goods carriers, and that such law must be interpreted as requiring van lines to encourage, assist, and subsidize direct competition between itself and carrier-agents which have obtained, as a result of the MCA, nationwide operating authority. While the MCA certainly afforded such carriers that opportunity—that is, to obtain nationwide operating authority—the HGTA was for the specific purpose of ensuring that traditional pooling agreements controlled by the van lines would be preserved. In fact, all of the sources, which Petitioners urge as support for their position, require precisely the opposite conclusion. This the Court of Appeals saw clearly and viewed the action of the Commission approving the modification to the pooling plan of United as being precisely the sort of adjustment to a pooling relationship which Congress intended to be put into effect on an ex parte basis and without a hearing.

Intervention of this Court, in the way urged by Petitioners, would in fact be a thwarting of clearly articulated Congressional intent. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1986

THREE WAY CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the Interstate Commerce Commission (ICC) abused its discretion in approving, without a hearing, a revised traffic pooling arrangement involving a household goods van line and its carrier agents.

1. United Van Lines, Inc. (United) is a nationwide common carrier of household goods. During the relevant period, it operated through 606 trucking company agents, 228 of which had their own separate grants of operating authority from the ICC.[1] For many years, United has functioned pursuant to an ICC-approved pooling agreement giving its carrier agents the option of operating to the full extent of their ICC licenses (*Geitz Storage & Moving Co.—Investigation of Control—United Van Lines, Inc.*, 65 M.C.C. 257 (1955)). Pet. App. 3a.

[1] Under this arrangement, United acts as a coordinator of services performed by its agents in an agency capacity. In return, United retains a small portion of revenues on shipments performed by agents on its behalf. The agents retain the balance of revenues (according to the services performed by each). Pet. App. 36a. An agent may be

In 1980, Congress enacted legislation that significantly changed the relationship between van lines and their agents. Under the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, and the Household Goods Transportation Act of 1980 (HGTA), Pub. L. No. 96-454, 94 Stat. 2011 *et seq.*, Congress made it easier for common carriers to obtain interstate moving authority and to expand their operations. Based on this legislation, a number of United's agents—including petitioners—obtained authority for nationwide carriage, thereby enabling them to use United's name, reputation, and services, while at the same time reserving for themselves the more profitable long-distance shipments that, in the past, would have gone to United. Pet. App. 3a-4a.

In early 1981, United announced that it intended to amend its pooling agreement, and in November 1983 it formally petitioned the ICC for such an amendment. The proposed amendment requires carrier agents to tender to United any shipment in excess of 1700 miles, regardless of whether the carrier agent holds an ICC license authorizing it to handle the shipment on its own. Pet. App. 4a-5a.[2]

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either an independent moving company, which does not hold an ICC license and therefore moves goods only under its van line's operating authority, or a carrier agent, which can perform household goods transportation both as an agent of the van line it serves and as a competitor of that van line. See generally *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 211-212 (D.C. Cir. 1986). Agents find it economically advantageous to affiliate with United because of its centralized dispatch operations, support services, marketing programs, and national reputation (Pet. App. 36a).

[2] Prior to the amendment, carrier agents could choose one of three methods of operation: the first allowed independent handling of shipments up to 750 miles; the second up to 1500 miles; and the third allowed unlimited mileage. The plan chosen by an agent determined the benefits it received under the agreement. Specifically, the more independent authority the agent exercised, the less assistance it received from United. Pet. App. 5a n.2, 36a-37a.

2. United's proposed amendment was reviewed by the ICC pursuant to new statutory standards enacted by Congress in the MCA and the HGTA. Whereas the ICC was previously required to conduct a hearing on all such proposals, see 49 U.S.C. (1976 ed.) 5(1), the MCA provides that the ICC "shall * * * without a hearing, approve and authorize" such agreements unless the agreement in question (1) is found to be of "major transportation importance" *or* (2) would "unduly restrain competition." 49 U.S.C. 11342(b)(1). See also 49 U.S.C. 11342(b)(3) (ICC "shall streamline, simplify, and expedite, to the maximum extent practicable," the review of proposed pooling agreements). The HGTA establishes a presumption that a pooling agreement is consistent with the public interest and is not a restraint on competition if it embodies pooling practices that are the same as or similar to the practices approved by the ICC prior to the enactment of that legislation (49 U.S.C. 11342(b)(2)). Applying the presumption, the ICC's Review Board found that United's proposed revision was not of major transportation importance and that there was no substantial likelihood that it would unduly restrain competition (Pet. App. 31a-49a). It therefore approved the revised pooling agreement without a hearing (*id.* at 46a-48a).

On appeal, the ICC's Appellate Division agreed that no hearing was necessary (Pet. App. 17a-29a). It explained (*id.* at 22a-23a) that United's proposal was simply a revision of its existing pooling agreement and therefore was not of major transportation importance. It further noted (*id.* at 23a-24a) that the modification would not unduly restrain competition but instead would increase United's ability to compete with other van lines.

The court of appeals affirmed (Pet. App. 1a-14a). It agreed with the ICC that the proposal was not of major transportation significance and there was no substantial likelihood that it would unduly restrain competition (*id.* at

6a-14a). The court rejected petitioners' claim that, because the ICC had conducted a hearing in another household goods pooling proceeding (*Atlas Van Lines, Inc.—Pooling Application,* 48 Fed. Reg. 11795 (1983)), it was required to do so here as well. The court explained (Pet. App. 9a) that Congress had directed the Commission to expedite the application process and, in light of the ICC's previous examination of an analogous household goods pooling proposal, the ICC could properly rely on "experience gained in the process of reviewing these matters." The court further observed (*id.* at 9a-10a) that United's proposal was actually less restrictive than a number of pre-HGTA agreements approved by the ICC and that it therefore "would be futile to set a hearing on United's petition when there exist [such] agreements that by [49 U.S.C.] 11342(b)(2) enjoy presumptive validity."

3. Petitioners contend (Pet. 11-17) that the court of appeals erred in not ordering the ICC to conduct a hearing on United's amended pooling arrangement. That claim is without merit. The ICC and court of appeals correctly ruled that the revised agreement was not of major transportation importance and that there was no substantial likelihood that it would unduly restrain competition. Accordingly, under 49 U.S.C. 11342(b)(1), no hearing was required or even permitted.

a. On the issue of transportation significance, the court of appeals correctly recognized (Pet. App. 10a) that United's amendment is very similar to its original pooling agreement. Although the original agreement permitted agents to operate to the complete extent of their ICC-granted authority, United's agents, at the time the agreement was drafted, were as a practical matter ineligible to obtain independent nationwide authority. Indeed, even after the enactment of the MCA, only four carrier agents elected to handle shipments of unlimited mileage. Pet. App. 5a n.2, 10a, 23a, 37a. Thus, United's amendment af-

fects very few carriers and leaves the competitive situation within its system essentially the same. The amendment therefore is not of major transportation importance.

b. With respect to the amendment's effect on competition, the ICC and the court of appeals correctly concluded (Pet. App. 12a-13a, 23a-24a) that the amended agreement will in no way reduce competition between United and other national van lines but instead will promote it by making United more efficient. United has simply eliminated a "free rider" problem, whereby an agent is able to select the most lucrative, long-haul traffic for itself and tender the less lucrative traffic to United, while continuing to reap the benefits of United's facilities, reputation, and marketing. See generally *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 212-213 (D.C. Cir. 1986).

Petitioners nonetheless contend (Pet. 13-14) that the rationale adopted by the court of appeals and the ICC on the issue of competitive impact contravenes Congress's intent under the MCA and the HGTA. Specifically, they claim (Pet. 13; see Pet. App. 11a-12a) that Congress sought to enhance the ability of carriers to expand their operations, and that the ICC and court of appeals therefore erred in focusing on competition between United and other van lines rather than on the competitive impact *among* United's carriers. That contention is without merit.

As the court of appeals recognized (Pet. App. 12a), petitioners have cited nothing in the MCA, the HGTA, or the legislative histories of those statutes to show that the ICC's focus on inter-firm competition in this case is erroneous.[3] Nor do they cite any court decision in support of their in-

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[3] An agency's reasonable interpretation of the statutes it is responsible for administering is, of course, entitled to judicial deference. See generally *United States* v. *Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-845 (1984).

terpretation.[4] Moreover, the interpretation advanced by petitioners is simply not persuasive in the context of this case. Indeed, the ICC did not conclude that intra-firm competition was statutorily irrelevant but only that the primary competitive issue *in the present case* was inter-firm competition (Pet. App. 24a (emphasis added)):

> [T]he most important source of competition *at issue here* is United's ability to compete with other, major van lines, rather than with its own agents. A number of other van lines do not permit their agents to hold any interstate operating authority, and thus face no internal sources of competition. To the extent that United's ability to compete with other van lines is adversely affected by competition with its agents, the purposes of the HGTA are thwarted rather than advanced.

This reasoning is entirely consistent with congressional intent. There is no evidence that, in deregulating the household goods transportation industry, Congress intended to preclude the kind of amendment proposed by United. To the contrary, Congress clearly sought to leave intact "the ability of a van line to reach agreements enforcing 'the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject matter of the agency.' " *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 597 F. Supp. 217, 232 (D.D.C. 1984), aff'd,

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[4] Petitioners rely (Pet. 9, 14) on a prior ICC decision, *Practices of Motor Common Carriers of Household Goods*, 132 M.C.C. 599, aff'd *sub nom. North American Van Lines, Inc.* v. *ICC*, 666 F.2d 1087 (7th Cir. 1981). But the portion of *Practices* upon which petitioners rely (132 M.C.C. at 632) involved a wholly unrelated issue of whether the ICC should repeal prior regulations (49 C.F.R. 1056.18, 1056.21 (1979)) governing rates that carrier agents could set when competing with van line principals. *Practices* in no way suggests that the ICC, in reviewing pooling agreements, should look at intra-firm competition rather than inter-firm competition.

792 F.2d 210 (D.C. Cir. 1986) (quoting S. Rep. 96-497, 96th Cong., 1st Sess. 8 (1979)). Thus, the ICC and court of appeals were entirely correct in focusing on inter-firm competition.

c. The ICC's determination that a hearing was not required is correct for two additional reasons. First, United's proposal was less restrictive than a number of other pooling agreements in the industry that had been approved by the ICC prior to the enactment of the MCA and the HGTA.[5] It was therefore entitled to a presumption of validity under 49 U.S.C. 11342(b)(2). Second, the futility of a hearing in this case is underscored by the proceeding in *Atlas Van Lines*. The van line in that case similarly sought to limit the independent operating authority that could be held by its carrier agents. The ICC concluded, after a hearing, that the Atlas proposal was not a matter of major transportation significance and that there was no substantial likelihood that the proposed modification would unduly restrain competition. As the court of appeals explained (Pet. App. 8a), the Atlas amendment affected a much larger number of carrier agents than United's proposal, yet the ICC ultimately approved that proposal as well. The ICC's findings in the *Atlas* proceeding demonstrate *a fortiori* that United's proposal does not merit a hearing and that one would have been futile.[6]

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[5] As the court of appeals noted, when the HGTA was passed, several van lines prohibited their agents from having *any* independent authority (Pet. App. 9a (citing authority)).

[6] For that reason, petitioners err in asserting (Pet. 14-15) that because the ICC held a hearing in *Atlas*, one was required here. The HGTA (49 U.S.C. 11342(b)(3)) directs the ICC to "expedite, to the maximum extent practicable," the approval of applications. As the court of appeals indicated (Pet. App. 9a), it "would not be in keeping with the HGTA to require the Commission to ignore experience gained in the process of reviewing these matters.". Petitioners further err in contending (Pet. 15-17) that the ICC's opinion in the present

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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case is somehow internally inconsistent and that a hearing should be ordered on that basis. Nothing in the ICC's opinion supports petitioners' claim that a hearing was either necessary or appropriate in this case.

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